TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 350

WILLIAM G. BARR, PETITIONER,

vs.

LINDA A. MATTEO AND JOHN J. MADIGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 9, 1958

CERTIORARI GRANTED DECEMBER 15, 1958

lions, (b) was an unjustifiable raid on the United States Treasury, (c) enabled employees to collect cash for annual leave to which they were not entitled, (d) was a conspiracy to defraud the Government, and (e) otherwise that it was a highly questionable practice.

Plaintiffs claim:

1. That the press release issued by the defendant was in itself libelous as to them, and

2. That the press release, coupled with the attendant publicity, was such as to libel them as having committed a wrongdoing in public office.

The plaintiffs contend in publishing the libel the defendant was actuated by malice. The plaintiffs claim damages for injuries to their reputations, particularly in their professional or business capacities; for loss of earnings; and for pain and suffering of body and mind. Plaintiffs also claim punitive damages.

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Defendant's Pretrial Statement

This is an action for libel growing out of a press release concerning plaintiffs, officials of the Office of Rent Stabili- [fol. 12] zation issued by defendant as Acting Director of Rent Stabilization on February 5, 1953. Defendant denies liability for the following reasons:

1. He was clothed with absolute immunity by virtue of the fact that the press release was issued by him in connection with his official duties as Acting Director of the Office of Rent Stabilization.

2. The occasion under which the press release was issued was qualified privileged in that defendant was under a legal and/or moral duty to speak and he issued the press release without malice toward plaintiffs.

3. The statements contained in the press release regarding plaintiffs were true.

4. The statements contained in the press release were in the realm of fair comment.

5. The statements contained in the press release were not libelous since they imputed no illegal action or professional

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[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13217

WILLIAM G. BARR, APPELLANT

v.

LINDA A. MATTEO, APPELLEE

No. 13218

WILLIAM G. BARR, APPELLANT

v.

JOHN J. MADIGAN, APPELLEE

Appeals from the United States District Court for the District of Columbia

Joint Appendix—Filed April 27, 1956

In the United States District Court for the District of Columbia

Civil Action No. 3221–53

LINDA A. MATTEO, 3833 NORTH NINTH STREET, ARLINGTON, VA. AND JOHN J. MADIGAN, 12710 TWO-FARM-DRIVE, SILVER SPRING, MD., Plaintiffs.

vs.

WILLIAM G. BARR, MIDWAY HALL, 24TH AND OKLAHOMA AVENUE, N. E., WASHINGTON, D. C., OR 3519 NORTH EDISON STREET, ARLINGTON, VA., Defendant

COMPLAINT FOR LIBEL—Filed July 15, 1953

[fol. 2] Complaint of Linda A. Matteo and John J. Madigan, through their attorney, Byron N. Scott, respectively shows to the Court as follows:

Count I

1. Jurisdiction of this Court is based on Title II, Section 306, of the District of Columbia Code (1951 Edition) and

the fact that the amount involved exceeds Three Thousand Dollars ($3,000) exclusive of costs.

2. Plaintiff Linda A. Matteo was, during the time hereinafter mentioned, Director of Personnel Branch of the Office of Rent Stabilization, and had been a Civil Service employee for thirteen years, and Plaintiff John J. Madigan was, during the time hereinafter mentioned, Deputy Director, Administration, of the Office of Rent Stabilization, and had been a Civil Service employee for forty-two years, and both were and always had been persons of good name, credit and reputation, and deservedly enjoyed the esteem and good opinion of their co-workers and superiors, and neighbors and other worthy citizens of the District of Columbia and of the United States, and until the commission of the grievances hereinafter set forth, were not suspected of conduct or practices in any manner inimical to the best interests of the United States or its Government, or of "bilking," "defrauding" or "conspiring to defraud" the United States or of participating in any "unjustifiable raid on the United States Treasury" or of violating any law or the "spirit" of any law.

3. The defendant, William G. Barr, during the time hereinafter mentioned was Deputy Director of the Office of Rent Stabilization for the United States.

4. The defendant is sued for damaging and injuring the plaintiffs through the process of libel as hereinafter more fully will appear and because the defendant, in the hope of furthering his own political fortunes, falsely, maliciously and in reckless or careless indifference to the rights and feelings of the plaintiffs, composed, wrote, published, cir-
[fol. 3] culated, distributed and caused to be composed, written, published, circulated and distributed, the libel hereinafter set forth.

5. On the 5th day of February 1953, newspapers of general circulation in the District of Columbia and elsewhere carried news articles under various headlines such as: "U. S. Bilked 'Millions' by Leave Trick," which contained, inter alia, the following words and statements: "Sen. John J. Williams (R, Del.) who exposed the Internal Revenue Bureau scandals, said the 'highly questionable' maneuver, now discontinued (meaning various terminal leave pay-

ments made in 1950 to 49 employees of the Office of Rent Stabilization), was an 'unjustifiable raid' on the Treasury''; ''Sen. Williams charged in a Senate speech that some government agencies used the fire-and-rehire technique to enable employees to collect cash for unused annual leave even tho they were not really entitled to it''. ''Sen. Williams listed the Office of Rent Stabilization as one offender''; ''Sen. Homer Ferguson (R. Mich.) noted that Edwin D. Dupree, Jr., listed by Sen. Williams as General Counsel of the rent office, received a leave payment of $3,654, and was rehired the next day. It is 'apparent,' Sen. Ferguson said, that Dupree was 'in the conspiracy to defraud the government'; Sen. Williams (R.) of Delaware charged in the Senate yesterday that federal employees profited from an 'unjustifiable raid' on the United States Treasury authorized by their agencies, using 'highly questionable' leave practices which may cost millions''; ''The Senator said that in the rent agency alone 49 employees had received $88,266 in terminal leave payments''; ''Williams said he felt an investigation should be made by the Senate Appropriations Committee and the Government Operations Committee to 'examine the extent to which this questionable procedure, had been followed and, if the laws have been violated, appropriate steps should be taken' ''; ''Officials of the rent agency have confirmed that the practice was followed in that bureau, Williams said, adding that 'to say the least it is an unjustifiable raid on the federal treasury, and the heads of every agency in the government who have condoned this practice should be called to task' ''; ''The Attorney General, a Senate investigating committee and the General Accounting Office were expected today to get on the trail [fol. 4] of a vacation pay practice described by Senator Williams, Republican, of Delaware as a raid on the Treasury by many Government Agencies''; ''Senator Williams estimated that the 'questionable practice' may have cost the government millions of dollars'.''

6. The matters alleged in paragraph 5 herein were widely circulated and had the tendency and did cause the readers of these papers to believe that various people had engaged in a plan to ''bilk'' the United States of millions of dollars by a ''leave trick'' or ''highly questionable maneuver'' to ''collect cash for unused leave even though they were not

really entitled to it" and had engaged in "a conspiracy to defraud the Government."

7. The defendant, well knowing the premises, but maliciously contriving and intending to benefit himself and to injure the plaintiffs, and to deprive them of the respect, confidence and esteem peculiarly essential to plaintiffs' professions, and maliciously contriving and intending to injure the plaintiffs in their good names, reputations, and the esteem of their co-workers and neighbors, and to bring them into public scandal, ridicule and professional disrepute before their co-workers, neighbors, government workers, friends, acquaintances and residents of the District of Columbia and of the United States, and to hold the plaintiffs up to public scorn, contempt, ridicule and disgrace, and to injure them in pursuit of their livelihood, and to benefit the defendant politically, and to cause it to be suspected and believed that the plaintiffs as Government Employees, in the conduct of their offices, had been guilty of "bilking," "defrauding" and "conspiring to defraud" the United States and of being "responsible" for and "participating in" an "unjustifiable raid on the United States Treasury," and violating the spirit of a Federal Statute, did heretofore, to wit, on or about the 5th day of February 1953, falsely, wrongfully, knowingly, wilfully and maliciously publish and circulate and cause to be published and widely circulated among newspapers and others in the District of Columbia and elsewhere for the purpose and with the intention of having the same published of and concerning the plaintiffs, in a writing denominated "Special Release, Office of Rent [fol. 5] Stabilization, Washington, D. C.," the following false, scandalous and defamatory libel, that is to say:

Special release

For immediate release,
February 5, 1953

Office of Rent Stabilization
Washington, D. C.

William G. Barr, Acting Director of Rent Stabilization today served notice of suspension on the two officials of the agency who in June 1950 were responsible for the plan which allowed 53 of the agency's 2,681 employees to take their accumulated annual leave in cash.

Mr. Barr's appointment as Acting Director becomes effective Monday, February 9, 1953, and the suspension of these employees will be his first act of duty. The employees are John J. Madigan, Deputy Director for Administration, and Linda Matteo, Director of Personnel.

"In June 1950," Mr. Barr stated, "my position in the agency was not one of authority which would have permitted me to stop the action. Furthermore, I did not know about it until it was almost completed.

"When I did learn that certain employees were receiving cash annual leave settlements and being returned to agency employment on a temporary basis, I specifically notified the employees under my supervision that if they applied for such cash settlements I would demand their resignations and the record will show that my immediate employees complied with my request.

"While I was advised that the action was legal, I took the position that it violated the spirit of the Thomas Amendment and I violently opposed it. Monday, February 9th, when my appointment as Acting Director becomes effective, will be the first time my position in the agency has permitted me to take any action on this matter, and the suspension of these employees will be the first official act I shall take."

Mr. Barr also revealed that he has written to Senator [fol. 6] Joseph McCarthy, Chairman of the Committee on Government Operations, and to Representative John Phillips, Chairman of the House Subcommittee on Independent Offices Appropriations, requesting an opportunity to be heard on the entire matter.

8. The foregoing referred specifically to plaintiffs by their respective names, charged them with having violated the law, and was meant and intended to convey that plaintiffs were "responsible" for a plan which had "bilked" the United States of "millions" by "trick leave", in a "highly questionable maneuver," by an "unjustifiable raid on the Treasury" which had enabled the plaintiffs to "collect cash for unused annual leave even tho they were not really entitled to it"; that they were "offenders" against the Government of the United States, and that they had engaged in a "conspiracy to defraud the Government"; and did by insinuation and innuendo charge the plaintiffs with dealing dishonestly with the Government or with being guilty of

some crime, and was meant and intended to hold the plaintiffs in contempt in the eyes of the people of the District of Columbia and elsewhere.

9. On February 6, 1953, defendant composed and dispatched and caused to be composed and dispatched over the teletype to individuals in Boston, Massachusetts, Cleveland, Ohio, Dallas, Texas, Philadelphia, Pennsylvania, Atlanta, Georgia, Chicago, Illinois and San Francisco, California, the following writing, to wit:

> Watch for Barr story wired you yesterday. Advise us how you handled. Please rush all clippings this subject without delay.

meaning the "News Release" set forth in paragraph 7 herein and intending thereby to secure the widest possible circulation of the said release and to hold the plaintiffs up to public scorn, contempt, ridicule and disgrace before as many people as possible.

. . . . . .

(Signed) Byron N. Scott.

[fol. 7] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed August 4, 1953

Comes now the defendant by his attorney, the United States Attorney, of the District of Columbia, and moves this Court to dismiss the complaint on the grounds that the complainant fails to state a claim on which relief can be granted and on the further grounds that this is a suit against the United States without its consent.

. . . . . .

In United States District Court

Memorandum to the Clerk—Filed September 2, 1953

The motion of the Defendant to dismiss the complaint is overruled on the authority of Colpoys v. Gates, 73 App. D. C. 193, 118 F. 2d 16 (1941).

Order is entered herewith.

(Signed) Charles F. McLaughlin, Judge.

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In United States District Court

Order Denying Motion to Dismiss—September 2, 1953

The above-entitled cause having come on for oral hearing before the Court on the motion of the Defendant to dismiss the complaint filed herein, and the Court having fully considered the complaint and the argument had therein and the written memoranda and points and authorities filed by Plaintiff and Defendant, respectively, in support of, and in opposition to, the said motion, and the Court being fully advised in the premises, it is this 2nd day of September 1953,

Ordered, that the said motion of the Defendant be and the same is hereby overruled.

(Signed) Charles F. McLaughlin, Judge.

• • • • • • •

[fol. 8] In United States District Court

Answer—Filed September 15, 1953

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The alleged libel is a statement of the truth about the defendant and the facts to which it relates.

Third Defense

The alleged libel was in the realm of fair comment, being a statement to the press concerning facts within defendant's knowledge.

Fourth Defense

Plaintiffs have not suffered any damage as a result of the alleged libel.

Fifth Defense

The statement by defendant here complained of is not libelous since it imputes no illegal action or professional incompetence to plaintiffs, but merely disapproval of plaintiffs' acts.

Sixth Defense

Answering the numbered paragraphs of the complaint, defendant avers:

1. Defendant need not answer paragraph 1 as it states a conclusion of law.

2. Defendant admits the allegations as to plaintiffs' respective positions of employment but is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations in this paragraph.

3. Admitted.

[fol. 9] 4. Defendant admits the nature of the suit as alleged in this paragraph but denies the remaining allegations contained herein.

5. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 of the complaint.

6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 6 of the complaint but avers that if the facts alleged therein be true, this action does not lie since the alleged damage, if any, to plaintiffs arose from statements by others than defendant herein.

7. Defendant denies paragraph 7 of the complaint except that he admits that he issued the quoted press release with the intention that it be circulated and published.

8. Defendant admits that the press release quoted in paragraph 7 of the complaint referred specifically to plain-

tiffs by their respective names. Defendant denies the remaining allegations in this paragraph of the complaint and feels obliged to point out that the press release specifically renounced an implication of illegal action by plaintiffs.

9. Defendant admits the allegations of this paragraph of the complaint except that he denies the alleged intention on his part beyond the intention to secure the widest possible circulation of the press release complained of herein.

10. Denied.

Wherefore, having fully answered each and every allegation of the complaint, defendant demands judgment in his favor together with the costs of this action.

* * * * * * *

IN UNITED STATES DISTRICT COURT

AMENDMENT TO COMPLAINT—Filed October 10, 1955

Come now the plaintiffs and with the consent of counsel for the defendant hereby amend their complaint in the following respects:

[fol. 10] (a) By striking paragraph 10 of the complaint and substituting in lieu thereof the following:

As a result of the libelous words published by the defendant as aforesaid, plaintiffs have been greviously injured in their good names and reputations and in their professions or businesses; they have undergone great pain and suffering of body and mind, and they have suffered substantial losses of earnings.

(b) By striking the ad damnum clause of the complaint and substituting in lieu thereof the following:

Wherefore, the plaintiff, Linda A. Matteo, demands judgment for compensatory damages in the sum of $150,000 and punitive damages in the sum of $100,000, besides costs; and the plaintiff, John J. Madigan, demands judgment for compensatory damages in the sum of $150,000 and for punitive damages in the sum of $100,000, besides costs.

* * * * * * *

In United States District Court

Pretrial Proceedings—Filed October 11, 1955

Statement of Nature of Case

The pretrial statements of plaintiffs and defendant, attached hereto, are adopted.

Plaintiffs are hereby granted leave to amend their complaint and defendant is hereby granted leave to amend his answer.

Defendant is hereby granted leave to file a motion for summary judgment provided that said motion shall be filed within such time as not to delay the trial of this action in the event said motion is denied.

Plaintiffs are hereby granted leave to take the deposition of the defendant at a time to be fixed by counsel.

It is stipulated that a copy of the press release complained of, dated February 5, 1953, and initialed by the counsel, may be received in evidence.

Edward M. Curran, Pretrial Judge.

* * * * * * *

[fol. 11] Pretrial Statement of the Plaintiffs

This is an action for libel. The words complained of were contained in a press release issued by the defendant on February 5, 1953, which is recited verbatim in paragraph 7 of the complaint and incorporated herein by reference.

At the time of the publication of the libel, plaintiff Madigan was Deputy Director for Administration, plaintiff Matteo was Director of Personnel, and defendant Barr was Deputy Director, respectively, of the Office of Rent Stabilization, a United States Government Agency.

The said press release was issued coincident with stories widely circulated and reported in various newspapers, including those in the District of Columbia, to the effect that the plan mentioned in the press release, in connection with which the defendant had identified the plaintiffs, (a) constituted a trick which had bilked the United States of mil-

incompetence to plaintiffs but merely disapproval of plaintiffs' acts.

Finally, defendant takes the position that plaintiffs have suffered no damage by virtue of the statements concerning them in the press release complained of.

IN UNITED STATES DISTRICT COURT

AMENDED ANSWER—Filed November 10, 1955

Pursuant to leave granted at pretrial of this action, defendant's answer to the complaint is hereby amended in the following particulars:

Sixth Defense

3. Denied. Defendant, William G. Barr, was at the time of the issuance of the press release and at all times material to the allegations of the complaint, Acting Director of the Office of Rent Stabilization.

9. The teletype referred to in paragraph 9 of the complaint was sent by the national public information officers of the Office of Rent Stabilization to the regional public in- [fol. 13] formation officers of said agency as a necessary step in coordinating the information services of the Washington and Field Offices and constituted a normal and usual step in official duties of the agency.

Seventh Defense

At all times material herein defendant was Acting Director of the Office of Rent Stabilization. The press release referred to in the complaint was made by defendant in furtherance of his official duties, was within the scope of his authority, and defendant is therefore immune from civil liability therefor.

* * * * * * *

IN UNITED STATES DISTRICT COURT

STATEMENT OF TESTIMONY—Filed April 13, 1956

On the 10th day of November 1955, this cause came on to be heard before the Honorable Alexander Holtzoff, Judge

of the District Court for the District of Columbia. The plaintiffs appeared by Byron N. Scott and Richard A. Mehler, as counsel, and the defendant appeared by Robert L. Toomey, Edward O. Fennell and Irvin M. Gottlieb, as counsel. After all parties announced that they were ready for trial, a jury was empanelled and sworn to try the cause, when, among others, the following proceedings were had:

Mr. Scott made an opening statement on behalf of plaintiffs (15-20).[1] Mr. Fennell then made an opening statement in behalf of the defendant (20-29).

Plaintiffs, to sustain the issues in their behalf, offered as evidence in chief the February 5, 1953, press release and the February 6, 1953, teletype issued by defendant, and they were stipulated to by defendant's counsel (33, 36), and they were read into the record (Plaintiffs' Exhibit 1 and 2) (34–38). Pursuant to instructions from the court (30–33), plaintiffs rested after having reserved the balance of their case.

[fol. 14] William G. Barr, the defendant was called as a witness in his own behalf, and after being first duly sworn, testified as follows:

Direct examination.

By Mr. Fennell:

In 1950, I was employed by the Office of the Housing Expediter in Washington, D. C., as General Manager, which was in effect the second person in charge (39). Plaintiff John Madigan was Deputy Housing Expediter in charge of administration, *i.e.*, personnel, budget and fiscal matters (39–40) and the plaintiff Linda A. Matteo was in charge of personnel (40).

Defendant's Exhibit 1, a memorandum dated May 29, 1950, stipulated to as having been prepared and signed by Madigan (45) and sent by him to G. W. Comfort and L. A. Matteo, was read into the record (41–44).

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[1] Parenthetical numerical references are to the pages in the transcript.

Defendant's Exhibit 2, a memorandum, dated May 31, 1950, from Madigan to Tighe Woods, Housing Expediter, was then read to the jury.

Plaintiff's counsel then agreed to stipulate that a condition existed in OHE making it necessary to do something to conserve money; that Madigan proposed to a regular staff meeting a method for handling it; that Barr wrote a memorandum to Woods which opposed it; and that Madigan had then written to Barr his comments on Barr's opposition (50–52). Defendant, pursuant to the stipulation, then offered in evidence (53): Exhibit 3, a memorandum, dated June 1, 1950, from Madigan to Messrs. Barr, Diggle, Dupree, McCarthy, and O'Brien; Exhibit 4, which was a memorandum, dated June 1, 1950, from Barr to Woods, entitled "Summary of Staff Meeting June 1, 1950"; and Exhibit 5, which was the June 2, 1950 memorandum to Barr from Madigan.

After a discussion between the Court and Mr. Fennell (54–58), Barr continued his direct examination.

I was present at a staff conference on June 1, 1950 at which Madigan's plan was presented to the staff (58–59). The plan was presented to Tighe Woods who overruled it shortly after the staff meeting (59). I later learned that 53 employees out of 2,500 took advantage of the plan (59) including Mrs. Matteo and Mr. Madigan (60). They "termi-
[fol. 15] nated themselves one day as permanent employees; received their lump sum accumulated annual leave; were rehired the next day; continued employment as temporary employees, with the intent to convert back to permanent employees at a later date" (60–61). Plaintiffs along with others of the 53 reverted back to permanent employee status (61). At the time the press release was issued in February 1953, "I was Acting Director [of Rent Stabilization] in the sense that the Director was out of town and the regulations provided that the Deputy Director, which was my position, would become Acting Director in that type of case" (63).

Cross-examination.

By Mr. Scott:

I was Deputy Director on February 5, 1953, and with the Director out of town I could act as Director. I would become

Acting Director on February 9, 1953, as stated in the press release, because the permanent Director was resigning and I was being appointed Acting Director. I thought the powers in either sense were the same (64). I was firm in my convictions against Madigan's plan because I thought it improper (64–65). I would not have given approval to any plan that would have in any way violated the spirit of the law (66).

Counsel stipulated as to the provisions of the Thomas Amendment (68).

Plaintiffs introduced into evidence Exhibits 3, 4, 5 and 6, personnel forms carrying into effect for John J. O'Brien, Deputy Director for Information (72) the same personnel actions described under the Madigan Plan (68–75).

Redirect examination.

By Mr. Fennell:

I thought the plan improper because it violated the spirit and intent of the Thomas Amendment (75). I asked the General Accounting Office for an opinion as to the legality and on ruling it illegal the employees were required to pay the funds back (76). The plan proposed by Madigan at the staff conference contemplated that employees would be terminated as permanent employees, collect their accumulated annual leave in a lump-sum payment, be reappointed the next day as temporary employees, stay on as temporary [fol. 16] employees for a month or two or three and be reconverted to permanent employees all while holding the same positions (96). I felt this violated the spirit of the Thomas Amendment (96) and illustrated the point on the blackboard (97–101). On January 28, 1953, I was acting head of the agency because the head was out of town (103). A letter, dated February 3, 1953, to Senator Williams over my signature (Defendant's Exhibit 7) was prepared by Mr. Madigan (106–107) and I first learned of it when I saw a copy of it on my desk (107). On learning of the letter, I told Madigan that in my opinion the letter defended the 1950 plan and asked why it had been sent without my knowledge (108). Madigan explained that Senator Williams had inquired and was in a hurry for the reply and that my secretary, or someone else in the office, signed the letter; I told

Madigan that I should have been contacted because I would not have defended the plan (108). Senator Williams made a speech on the Senate floor the following day (109). Newspapers and other interested parties contacted me about Plan X between February 3 and 5 (109–110). On February 5, I spoke to Mrs. Matteo and Mr. Madigan in my office before the issuance of the press release (110). I stated to them that the plan had been made public, the agency was being bombarded with questions from newspapers and other forms of public media, that the agency was being subjected to severe criticism and that in order to protect the good name of the agency and myself I had to take disciplinary action against an act which I deemed improper (110–111). In response to the court's question that I "propose to suspend them for something they did in 1950," I said "Yes, sir." (111). "And certainly no action would have been taken in 1953 if this matter had not become a public issue" (111).

In an exchange between the Court and counsel the following was developed: the suspensions were somewhat delayed; although a board after a hearing recommended revocation of the suspensions, Dr. Flemming, head of Economic Stabilization Agency, reversed the board and upheld the suspensions (116–118).

[fol. 17] Charles P. Liff was called as witness and he testified as to matters not material to the appeal in this case (119–122).

The defense rested (122).

At the request of Mr. Scott, the Court took judicial notice of the fact that the Thomas Amendment, *i.e.*, Section 1212 of the General Appropriation Act of 1951, was approved on September 6, 1950 (122–123).

Linda A. Matteo, one of the plaintiffs was called as a witness and being first duly sworn testified as follows:

Direct examination.

By Mr. Scott:

In 1950, I was director of personnel for the Office of the Housing Expediter which later became the Office of Rent

Stabilization (128). As such, I was responsible for all the technical aspects of a personnel program, which included recruiting, placement, disciplinary action, classification and I also was responsible for advising the deputy for administration on any procedures or policy matters, consulting with him on any suggested changes in those matters (128–129). I remember receiving Mr. Madigan's memorandum of May 26 (Defendant's Exhibit 1) (130). The purport of it was that the agency was faced with a difficult financial situation and Mr. Madigan was trying to find ways and means of conserving funds for the agency, for future operational problems, as well as immediate needs (130). The memorandum had outlined a plan for using an appropriation for terminal leave to relieve some of the heavy obligation of the agency in terminal leave (131). The memorandum asked my advice on this procedure (131). The agency was already on reduction-in-force notices and Mr. Madigan's proposal provided that those with maximum leave or who would not be hurt by it would be terminated under the reduction-in-force notices and given limited temporary appointments on the day following the reduction-in-force terminations which they would live out until they were either dropped from the agency, or transferred or whatever their future might hold (132–133). Thirty-days notice must be given before firing a permanent employee but there is no such requirement for firing a temporary employee (133). I knew of precedents for the use of such a procedure (134).

[fol. 18] The court at Mt. Scott's request then took judicial notice of two Comptroller General's decisions, *i. e.*, 26 C. G. 259 and 27 C. G. 41 (134–136).

The plan had advantages and disadvantages to the agency and the employees (137–139). I did not attend the staff conference on June 1; I was advised that Mr. Woods, Director of OHE, said that the plan was too complicated to explain to the field offices and would not be adopted generally (140–141). The subject of the plan came up later when Miss Bucher, my chief of placement, came to me with a list of some 20 names of persons who wanted to volunteer for the plan if adopted (141). I asked Mr. Woods about it and after some discussion he gave permission for use of the plan in some 50-odd cases who volunteered for it (141–142,

144). I did not talk with Mr. Madigan before my discussion with Mr. Woods, but I told Mr. Madigan of the outcome (142). Mr. Barr ordered the O'Brien personnel action in December 1950 (144–147). On February 5, 1953, I was Director of Personnel for the Office of Rent Stabilization at a $10,000 a year salary (147). On that day, Mr. Barr sent for me and I had a talk with him in his office; Mr. Madigan also was present (147). Barr told us that he had talked to a lot of people, to Tighe Woods, ESA, Albert Thomas, and that he had to do something about this; that he wanted to keep his job, and in order to protect himself he was going to suspend us on the 9th and he handed each of us a letter (147–148). I received a letter of suspension on the 9th but it was later withdrawn (148). On the 12th I received a letter of intention to suspend on the 24th (148–149).

Cross-examination.

By Mr. Fennell:

I sent Madigan a memorandum in response to his memorandum of May 26 (150) and he incorporated it into his 7-page memorandum (152). I took advantage of the plan (155). OHE was due to expire on June 30, 1950, and the plan was proposed before new legislation extending the life of the agency was enacted and the plan as to 49 volunteers went into effect on June 25 and on June 23 Congress had extended the life of OHE and no appropriation was passed until September, as I recall it (163–164). I and the other participants in the plan were required to pay the money back (165).

[fol. 19] JOHN J. MADIGAN, one of the plaintiffs being duly sworn testified as follows:

Direct examination.

By Mr. Scott:

In 1950, I was employed by the Office of Housing Expediter in the national office in Washington, D. C., as Deputy Housing Expediter for Administration (168). There were

other deputies and special assistants (168). I had the Administrative Division with three branches: Administrative Services headed by William H. Weed; Budget, Planning and Finance headed by William G. Comfort; and Personnel headed by Mrs. Matteo (169). In 1950, my duties were the general supervision of these branches performing the housekeeping functions and I was responsible to the Director for plans or means for conserving funds (170). Mr. Barr and Tighe Woods were my immediate superiors (170). On May 26, I sent a memorandum to Mrs. Matteo and Mr. Comfort about the proposed procedure (Defendant's Exhibit 1) (171). The memorandum was sent to get reactions of interested people which was usual practice (171). Mrs. Matteo commented in writing and Comfort discussed it with me (171). Both Mrs. Matteo and Mr. Comfort volunteered under the procedure (171). Comfort was not suspended (172). I knew of the Comptroller General's decisions (172). I attended a staff conference in Mr. Barr's office on June 1 and the plan was fully discussed (172). Present were the eight heads of divisions and special assistants (see page 168) but Mr. Woods was out of the city (173). The following day a special meeting was called to reconsider the matters discussed on June 1, and Woods then indicated that the plan was too complicated to explain to the field and therefore it would not be adopted generally (173–174). Barr was present at the meeting (174). I next heard about the matter some time later when Mrs. Matteo reported that she had talked to Mr. Woods about some application of it (174). The plan was authorized for the 49 employees after Mrs. Matteo's conversation with Mr. Woods (175). I volunteered for the plan (175). On January 28, 1953, I was Deputy Director of Rent Stabilization (Administration) and on January 30 I received a letter addressed to ORS from Senator Williams (175). This occurred on Friday [fol. 20] January 30 in the afternoon (175) and Mr. McCarthy of the Congressional liaison unit handed it to me (176). I immediately read the letter and as I was concluding it, the Director of Rent Stabilization, Mr. Henderson, dropped in for a chat and we discussed the letter (176). The writer of the letter was confused since the letter referred to mass resignations in 1951 and I suggested to Mr. Henderson, who was not in the agency in 1950, that a letter

be sent to Senator Williams about the 1950 situation (176). Mr. Henderson agreed (176). The first thing on the following Monday morning I prepared a preliminary rough draft of an answer to Senator Williams and referred copies to others for views and after getting some drafts back with comments, the Personnel Division was asked to compile from records certain information asked for by Senator Williams (177). Senator Williams telephoned at 9:30 a. m. and asked about the letter, and I told him it was being given undivided attention (177), and he called again about two hours later and asked if the letter could be picked up on the following day, *i. e.*, Tuesday, February 3. In preparation of the final draft, I did not attempt to see Mr. Barr about it but I tried to get the approval of various interested officials (178). My secretary then took the final letter for Mr. Barr's signature and she was advised that he was at a conference at Economic Stabilization Agency and was not expected back until after noon time and Frances Gordon, Mr. Henderson's secretary, volunteered to sign it in Barr's name as Acting Director (179). As soon as it was signed, I sent the file with a note to Mr. Barr's office (179). I talked to Barr about it on the same day; and Barr did not criticize me for having sent it out or for having had it signed by his secretary (180). Another letter was sent to Senator Williams on the next day which I prepared for Barr's signature (181). I talked to Barr on February 5 (181) in his office with Mrs. Matteo present after Barr sent for us (182). Barr said that he had talked to a lot of people—Tighe Woods, officials at Economic Stabilization Agency and Albert Thomas, congressman from Texas (182). Barr told us that he was suspending the two of us after indicating that he wanted to protect himself (183).

[fol. 21] Cross-examination.

By Mr. Fennell:

Mr. Barr had always been against the plan (183–184). When the letter to Senator Williams was prepared, I knew that Barr was Acting Director and that Mr. Henderson had submitted his resignation (184). A draft of the letter was not sent to Mr. Barr because it was not customary to send those things around to everybody at every stage (185). At

the Friday January 30 conversation, Mr. Henderson did not give instructions to prepare the reply to Senator Williams because that was one of my functions and he merely agreed to reply as I had suggested (186). In 1950, Mr. Woods said the plan seemed complicated, there was not enough time to inform the personnel, and it would not be adopted generally (187). This decision was made at the special staff meeting (187). On June 23, 1950, the life of the agency was extended for a year with certain qualifications (187–188). The plan went into effect for 49 persons on June 25, 1950 (188). My plan was predicated on the fact that the agency was headed towards liquidation (191). The object of the plan was to use up $2,600,000 earmarked for terminal leave (196).

John J. O'Brien and Burnham W. Diggle were called as witnesses in succession, and both testified to matters not at issue on the appeal (201–219).

William G. Barr, the defendant, on being called as a witness by counsel for plaintiffs, having previously been sworn, testified as follows:

Direct examination.

By Mr. Scott:

I recommended to Mr. Woods that the position of Deputy Director for Administration be abolished (223). My memorandum so recommending was dated May 26, 1950 (223). At the February 5, 1953 conference with Mrs. Matteo and Mr. Madigan, I told them that I intended to suspend them on the 9th (225). Before the conference, the matter had been discussed with members of my staff, Congressman Thomas, and several other people and I took the action as head of the agency (226). The latter had also been discussed with Ross Scherer, Acting Director of ESA, the parent agency of ORS on February 4 (228).

[fol. 22] Mr. Toomey on behalf of defendant referred the Court to a Joint Resolution approved on June 29, 1950 (64 Stat. 302), which made applicable to the Office of the Housing Expediter the provisions of the General Appropriation

Act, 1951, as passed by the House of Representatives on May 10, 1950, and this included the Thomas Amendment (232–235).

I discussed the matter with Ross Scherer, acting head of ESA (240–242). I decided to take disciplinary action because of the criticism that was being presented against the agency (242). In my opinion the letter to Senator Williams defended the plan and that it was not my position in the matter (243). I acknowledge that during the course of the administrative hearing with respect to the suspensions I said that Mr. Scherer had called me about the matter and I told him that I was contemplating disciplinary action because I felt there was no defense for the plan and I had to protect the integrity of the agency and because of my personal position in the matter and the letter had been sent to Senator Williams without my knowledge (245–249).

Cross-examination.

By Mr. Fennell:

In 1950 I had a staff member Ben Yoshioka survey the agency with respect to the organization and on the basis of it made recommendations (250–252).

Exhibit 8 was introduced on behalf of the defendant to show that Mr. Barr was Acting Director in February 1953 (252–254); these included the following: a June 4, 1952, memorandum from Tighe Woods to all ORS employees appointing Barr as Deputy Director of Rent Stabilization; a January 31, 1953, letter from Economic Stabilization Director Michael V. DiSalle appointing Barr as Acting Director of ORS effective at the opening of business on February 9, 1953; a February 2, 1953, memorandum designating Barr as Acting Director on February 2 through 6 during the absence of the Director Henderson; General Order 9, as amended, setting forth the organization of ORS; and the job description of the Deputy Director of Rent Stabilization.

Defendant moved for a Directed Verdict on the basis of (1) truth, (2) there was no defamatory imputation in the [fol. 23] press release, (3) there was a qualifiedly privileged occasion so that the plaintiffs had to prove malice (254–255). The Motion for Directed Verdict was denied

(255). The Court also denied the Motion for a Directed Verdict on the grounds of absolute privilege (260–261).

LINDA A. MATTEO, recalled as a witness by counsel for plaintiffs and having been previously sworn, testified as follows:

Cross-examination.

By Mr. Fennell:

I was reinstated in my position on April 28 (267–268). I was reduced in force on April 30 when ORS was about to expire (268–270).

JOHN J. MADIGAN, recalled as a witness by counsel for plaintiffs and having been previously sworn testified as follows:

Direct examination.

By Mr. Scott:

On February 5, 1953, my salary was $11,800 (275). I retired at $6,240 per year after working for the Government for 42 years (276–277).

Cross-examination.

By Mr. Fennell:

The suspension stood when the Economic Stabilization Administrator did not accept the board's recommendation that it be revoked (282). I elected to retire rather than go back to ORS (286).

Called as character witnesses were Sophie Donine, William Weed, John T. McCarthy and Florence Ada Bloomberg (289–314).

William G. Barr testified as to his net worth (323–325).

Both sides rested (325–380).

The jury was charged (383–401).

This statement has been prepared and is being filed in accordance with the provisions of Rule 75 (c) of the Federal

Rules of Civil Procedure for inclusion in the record on appeal of this action to the United States Court of Appeals to the District of Columbia Circuit.

[fol. 24]

DEFENDANT'S EXHIBIT 8

ECONOMIC STABILIZATION AGENCY,

Washington 25, D. C., January 31, 1953.

Hon. WILLIAM G. BARR,
Deputy Director,

Office of Rent Stabilization, Washington, D. C.

DEAR MR. BARR: You are hereby appointed as Acting Director of the Office of Rent Stabilization effective at the opening of business on Monday, February 9, 1953.

This appointment has been discussed with Mr. Ross Shearer who will become Acting Administrator of the Economic Stabilization Agency at the close of business on January 31, and he approves of this designation.

Thank you for your past efforts and sincere best wishes for your success.

Sincerely yours, MICHAEL V. DISALLE, ORS OFFICE NEWS, February 2, 1953.

No. 6.

During the absence of James McI. Henderson, Director of Rent Stabilization, from February 2 through February 6, *William G. Barr, Deputy Director,* will be Acting Director of Rent Stabilization, and all correspondence usually prepared for Mr. Henderson's signature should be prepared for Mr. Barr's signature.

[fol. 24a] (File endorsement omitted)

[fol. 25] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appeals from the United States District Court for the District of Columbia Upon Remand from the Supreme Court of the United States

Supplemental Joint Appendix—Filed March 3, 1958

IN UNITED STATES DISTRICT COURT

STATEMENT OF TESTIMONY

On the 10th day of November 1955, this cause came on to be heard before the Honorable Alexander Holtzoff, Judge of the U. S. District Court for the District of Columbia. The plaintiffs appeared by Byron N. Scott and Richard A. Mehler, as counsel, and the defendant appeared by Robert L. Toomey, Edward O. Fennell and Irvin M. Gottlieb, as counsel. After all parties announced that they were ready for trial, a jury was empanelled and sworn to try the cause, when, among others, the following proceedings were had: [fol. 26] Mr. Scott made an opening statement on behalf of plaintiffs (15–20). Mr. Fennell then made an opening statement in behalf of the defendant (20–29).

Plaintiffs, to sustain the issues in their behalf, offered as evidence in chief the February 5, 1953, press release and the February 6, 1953, teletype issued by the defendant. It was stipulated by defendant's counsel that the press release was issued by defendant and that the teletype was sent out or caused to be sent out by defendant to the directors or information officers of seven regional offices of the Office of Rent Stabilization (33, 35, 36). They were read into the record (Plaintiffs' Exhibits 1 and 2) (34–38). Pursuant to instructions from the Court (30–33), plaintiffs rested after having reserved the balance of their case.

WILLIAM G. BARR, the defendant was called as a witness in his own behalf, and after being first duly sworn, testified as follows:

Direct examination.

By Mr. Fennell:

In 1950, I was employed by the Office of Housing Expediter in Washington, D. C., as General Manager, which was in effect the second person in charge (39). Plaintiff John Madigan was Deputy Housing Expediter in charge of administration, i. e., personnel, budget and fiscal matters (39–40) and the plaintiff Linda A. Matteo was in charge of personnel (40).

Defendant's Exhibit 1, a memorandum dated May 29, 1950, stipulated to as having been prepared and signed by Madigan (45) and sent by him to W. G. Comfort and L. A. Matteo, was read into the record (41–44). It gave a general outline of Madigan's proposal and cautioned the recipients that "If there are 'bugs' in the foregoing and of course I am a bit apprehensive there may be, please do not hesitate to point them up prominently" (41–44).

Defendant's Exhibit 2, a memorandum dated May 31, 1950, from Madigan to Tighe Woods, Housing Expeditor, was then read to the jury.

It was then stipulated that a condition existed in OHE making it necessary to do something to conserve money; that Madigan proposed to a regular staff meeting a method for handling it; that Barr wrote a memorandum to Woods [fol. 27] which opposed it; and that Madigan had then written to Barr his comments on Barr's opposition (50–52). Defendant, pursuant to the stipulation, then offered in evidence (53): Exhibit 3, a memorandum, dated June 1, 1950, from Madigan to Messrs. Barr, Diggle, Dupree, McCarthy, and O'Brien; Exhibit 4, which was a memorandum, dated June 1, 1950, from Barr to Woods, entitled "Summary of Staff Meeting June 1, 1950"; and Exhibit 5, which was the June 2, 1950 memorandum to Barr from Madigan.

After a discussion between the Court and Mr. Fennell (54–58), Barr continued his direct examination.

I was present at a staff conference on June 1, 1950 at which Madigan's plan was presented to the staff (58–59).

The plan was presented to Tighe Woods who overruled it shortly after the staff meeting (59). I later learned that 53 employees out of 2,500 took advantage of the plan (59) including Mrs. Matteo and Mr. Madigan (60). They "terminated themselves one day as permanent employees; received their lump sum accumulated annual leave; were rehired the next day; continued employment as temporary employees, with the intent to convert back to permanent employees at a later date" (60–61). The two plaintiffs, along with the other 53 reverted back to permanent employee status (61). I talked to Mrs. Matteo about this plan at the staff meeting when it was discussed (62). At the time the press release was issued in February 1953, "I was Acting Director [of Rent Stabilization] in the sense that the Director was out of town and the regulations provided that the Deputy Director, which was my position would become Acting Director in that type of case" (63).

Cross-examination.

By Mr. Scott:

I was Deputy Director on February 5, 1953, and with the Director out of town I could act as Director. I would become Acting Director on February 9, 1953, as stated in the press release, because the permanent Director was resigning and I was being appointed Acting Director. I thought the powers in either sense were the same (64). I was firm in my convictions against Madigan's plan because I thought it improper (64–65). I would not have given approval to any plan that would have in any way violated the spirit of the law (66).

[fol. 28] Counsel stipulated as to the provisions of the Thomas Amendment (68).

Plaintiffs introduced into evidence Exhibits 3, 4, 5 and 6, personnel forms authorized or signed by defendant, carrying into effect for John T. O'Brien, Deputy Director for Information (72), the same personnel actions described under the Madigan plan (68–75).

I talked to Mr. O'Brien about this sometime after June, 1950. He said he needed funds and wanted to take advantage of this plan. I told him I was opposed to the plan, but it was not my decision to make. I told him he would have

to consult with Mr. Woods. Mr. O'Brien received approval from Mr. Woods, although I could not state this of my own knowledge (71–75).

Redirect examination.

By Mr. Fennell:

I thought the plan improper because it violated the spirit and intent of the Thomas Amendment (75). I asked the General Accounting Office for an opinion as to the legality and on ruling it illegal the employees were required to pay the funds back (76). The plan proposed by Madigan at the staff conference contemplated that employees would be terminated as permanent employees, collect their accumulated annual leave in a lump-sum payment, be reappointed the next day as temporary employees, stay on as temporary employees for a month or two or three, and be reconverted to permanent employees all while holding the same position (96). I felt this violated the spirit of the Thomas Amendment (96).

Defendant illustrated his point on the blackboard (97–99).

On January 28, 1953, I was acting head of the agency because the head was out of town (103).

It was stipulated that a letter, dated February 3, 1953, to Senator Williams over defendant's signature (Defendant's Exhibit 7) was prepared by Mr. Madigan (106–107).

I first learned of the letter when I saw a copy of it on my desk (107). On learning of the letter, I told Madigan that in my opinion the letter defended the 1950 plan and asked why it had been sent out without my knowledge (108). Madigan explained that Senator Williams had inquired and was in a hurry for a reply and that my secretary, or someone else in [fol. 29] the office, signed the letter. I told Madigan that I should have been contacted because I would not have defended the plan (108). Senator Williams made a speech on the Senate floor the following day (109). Newspapers and other interested parties contacted me about Plan X between February 3 and 5 (109–110). On February 5, I spoke to Mrs. Matteo and Mr. Madigan in my office before the issuance of the press release (110). I stated to them that the plan had been made public, the agency was being bombarded with questions from newspapers and other forms of public

media, that the agency was being subjected to severe criticism and that in order to protect the good name of the agency as well as myself, I had to take disciplinary action against an act which I deemed improper (110–111). In response to the Court's question if I "proposed to suspend them for something they did in 1950?" I said "Yes sir." (111). "And certainly no action would have been taken in 1953 if this matter had not become a public issue" (111).

In an exchange between the Court and counsel it was developed that plaintiffs were suspended on February 25; and although a board after a hearing recommended revocation of the suspensions, Dr. Flemming, head of Economic Stabilization Agency, ignored the Board's recommendations and upheld the suspensions. Defendant then fired plaintiffs but Dr. Flemming reversed the firings and reinstated both of them (116–118).

Charles P. Liff was called as a witness for the defense and testified to matters not material to the appeal in this case (119–122).

The defense rested (122).

At the request of Mr. Scott, the Court took judicial notice of the fact that the Thomas Amendment, i. e., Section 1212 of the General Appropriation Act of 1951, was approved on September 6, 1950, and did not by its terms apply to the Office of Housing Expediter (122–124).

Linda A. Matteo, one of the plaintiffs, was recalled as a witness and, being first duly sworn, testified as follows:

Direct examination.

By Mr. Scott:

In 1950, I was Director of Personnel for the Office of the Housing Expediter which later became the Office of Rent [fol. 30] Stabilization (128). As such, I was responsible for all the technical aspects of a personnel program, which included recruiting, placement, disciplinary action and classification. I also was responsible for advising the deputy for administration on any procedures or policy matters, consulting with him on any suggested changes in those

matters (128–129). I could not make policy for the agency myself, but had to go to Mr. Madigan or Mr. Woods (129). I remember receiving Mr. Madigan's memorandum of May 26 (Defendant's Exhibit 1) (130). The purport of it was that the agency was faced with an extremely difficult financial situation and Mr. Madigan was trying to find ways and means of conserving funds for the agency for future operational problems, as well as immediate needs (130). The memorandum had outlined a plan for using an appropriation for terminal leave to relieve some of the heavy obligation of the agency in terminal leave (131). The memorandum asked my advice on this procedure. This kind of request for advice was a usual procedure and had happened before (131).

The Court took judicial notice of the Housing and Rent Control Act of 1950 providing for the termination of rent control (131).

Mrs. Matteo then resumed her testimony as follows:

The agency was already on reduction-in-force notices and Mr. Madigan's proposal provided that those with maximum leave and who would not be hurt by it would be terminated under the reduction-in-force notices and given limited temporary appointments on the day following the reduction-in-force termination which they would live out until they were either dropped from the agency, or transferred or whatever their future might hold (132–133). Thirty-days notice must be given before firing a permanent employee but there is no such requirement for firing a temporary employee (133). I knew of precedents for the use of such a procedure (134).

The Court at Mt. Scott's request then took judicial notice of two Comptroller General's Decisions, i.e., 26 C. G. 259 and 27 C. G. 41, bearing on the point (134–136).

The plan had advantages and disadvantages to the agency and the employees (137–139). Other plans had been sub-[fol. 31] mitted to me for comment (139–140). I did not attend the staff conference on June 1. I was advised that Mr. Woods, Director of OHE, said that the plan was too complicated to explain to the field offices and "would not be adopted generally" (140–141). The subject of the plan came up later when Mrs. Boucher, my chief of placement, came to me with a list of some 20 names of persons who wanted to volunteer for the plan, if adopted (141). I asked

Mr. Woods about it and after some discussion he gave me permission for use of the plan in some 50-odd cases who volunteered for it (141–142, 144). I did not talk with Mr. Madigan before my discussion with Mr. Woods, but I told Mr. Madigan of the outcome (142). Mr. Barr told me that Mr. O'Brien wanted to take his leave. I told him that Mr. O'Brien was not then under reduction-in-force (144). On December 27, 1950 I received a personnel form asking for a reduction-in-force for Mr. O'Brien, signed by Mr. Barr (145). On February 5, 1953 I was Director of Personnel for the Office of Rent Stabilization at a $10,000 a year salary (147). On that day, Mr. Barr sent for me and I had a talk with him in his office; Mr. Madigan also was present (147). Barr told us that he had talked to a lot of people, to Tighe Woods, ESA, Albert Thomas and that they had said that "they will murder us if I don't do something about this" (148); that he wanted to keep his job, and in order to protect himself he was going to suspend us on the 9th but that he "hoped we would win" (148). He handed each of us a letter (147–148). I received a letter of suspension on the 9th but it was later withdrawn (148). On the 12th I received a letter of intention to suspend on the 24th (148–149).

Cross-examination.

By Mr. Fennell:

I sent Madigan a memorandum in response to his memorandum of May 26 (150) and he incorporated it into his 7-page memorandum (152). I took advantage of the plan (155). In December 1950, Mr. Barr also directed that Donald K. Martin be processed according to the Madigan proposal (156–157). OHE was due to expire on June 30, 1950, and the plan was proposed before new legislation extending the life of the agency was enacted and the plan as to 49 volunteers went into effect on June 25 and on June 23 Congress [fol. 32] had extended the life of OHE (163–164). When the plan went into effect, it would have saved the government or the agency money (164). No appropriation was passed until September, as I recall it (163–164). I and other participants in the plan were required to pay the money back (165).

JOHN J. MADIGAN, one of the plaintiffs being duly sworn, testified as follows:

Direct examination.

By Mr. Scott:

In 1950, I was employed by the Office of Housing Expediter in the national office in Washington, D. C. as Deputy Housing Expediter for Administration (168). There were other deputies and special assistants (168). I had the Administrative Division with three branches: Administrative Services headed by William H. Weed; Budget, Planning and Finance headed by William G. Comfort; and Personnel headed by Mrs. Matteo (169). In 1950 my duties were the general supervision of these branches performing the housekeeping functions and I was responsible to the Director for plans or means of conserving funds (170). Mr. Barr and Tighe Woods were my immediate superiors (170). On May 26, I sent a memorandum to Mrs. Matteo and Mr. Comfort about the proposed procedure (Defendant's Exhibit 1) (171). The memorandum was sent to get reactions of interested people which was usual practice (171). Mrs. Matteo commented in writing and Comfort discussed it with me (171). Both Mrs. Matteo and Mr. Comfort volunteered under the procedure (171). Comfort was not suspended (172). I knew of the Comptroller General's decisions (172). I attended a staff conference in Mr. Barr's office on June 1 and the plan was fully discussed (172), as were others (173). Present were the eight heads of divisions and special assistants (see page 168), but Mr. Woods was out of the city (173). The following day a special meeting was called to consider the matters discussed on June 1, and Woods then indicated that the plan was too complicated to explain to the people in the field in the time available for that purpose and therefore it "would not be adopted generally" (173–174). Barr was present at the meeting (174). I next heard about the matter some time later when Mrs. Matteo reported that she had talked to Mr. Woods about some appli- [fol. 33] cation of it (174). I did nothing whatsoever about the plan between the time Mr. Woods told me his decision and the time Mrs. Matteo came to me (174). The plan was authorized for the 49 employees as a result of Mrs. Matteo's

conversation with Mr. Woods (175). I volunteered for the plan (175). On January 28, 1953, I was Deputy Director of Rent Stabilization (Administration). On the afternoon of Friday, January 30, I received a letter addressed to ORS from Senator Williams (175). Mr. McCarthy of the Congressional liaison unit handed it to me (176). I immediately read the letter and as I was concluding it, the Director of Rent Stabilization, Mr. Henderson, dropped in for a chat and we discussed the letter (176). The writer of the letter was confused since the letter referred to mass resignations in 1951 and I suggested to Mr. Henderson, who was not in the agency in 1950, that a letter be sent to Senator Williams about the 1950 situation (176). Mr. Henderson agreed (176). The first thing on the following Monday morning I prepared a preliminary rough draft of an answer to Senator Williams and referred copies to others for views and after getting some drafts back with comments, the Personnel Division was asked to compile from records certain information asked for by Senator Williams (177). Senator Williams telephoned at 9:30 a. m. and asked about the letter and I told him it was being given my undivided attention (177), and he called again about two hours later and asked if the letter could be picked up on the following day, i. e., Tuesday, February 3. In preparation of the final draft, I did not attempt to see Mr. Barr about it but I tried to get the approval of various interested officials (178). My secretary then took the final letter for Mr. Barr's signature and she was advised that he was at a conference at Economic Stabilization Agency and was not expected back until after noontime and Frances Gordon, Mr. Henderson's secretary, volunteered to sign it in Barr's name as Acting Director (179). As soon as it was signed, I sent the file with a note to Mr. Barr's office (179). I talked to Barr about it on the same day; and Barr did not criticize me for having sent it out or for having had it signed by his secretary (180). Another letter was sent to Senator Williams on the next day [fol. 34] which I prepared and Barr signed (181). I talked to Barr on February 5 (181) in his office with Mrs. Matteo present after Barr sent for us (182). Barr said that he had talked to a lot of people—Tighe Woods, officials at Economic Stabilization Agency, and Albert Thomas, Congressman from Texas (182). Barr told us that "He said that he was

suspending the two of us after indicating that he wanted to protect himself" (183); He then said, "I hope you win" (183).

Cross-examination.

By Mr. Fennell:

Mr. Barr had always been against the plan (183–184). When the letter to Senator Williams was prepared, I knew that Barr was Acting Director and that Mr. Henderson had submitted his resignation (184). A draft of the letter was not sent to Mr. Barr because it was not customary to send those things around to everybody at every stage (185). At the Friday, January 30 conversation, Mr. Henderson did not give instructions to prepare the reply to Senator Williams because that was one of my functions and he merely agreed to reply as I had suggested (186). In 1950, Mr. Woods said the plan seemed complicated, there was not enough time to inform the personnel, and it "would not be adopted generally" (187). This decision was made at a special staff meeting (187). On June 23, 1950, the life of the agency was extended for a year with certain qualifications (187–188). The plan went into effect for 49 persons on June 25, 1950 (188). My plan was predicated on the fact that the agency was headed towards liquidation (191).

JOHN T. O'BRIEN, being duly sworn, testified as follows:

Direct examination.

By Mr. Scott:

In 1950 I was employed in the Office of Housing Expediter as the Director of Information. I was aware that the Agency was in some financial difficulty in June of 1950 (203). I heard Mr. Madigan's proposal discussed at a staff meeting (204). I asked to be processed under the plan in October or November of 1950. I talked to Mr. Barr about it (204). He told me that it would be all right for me to have it and that he would talk to Mr. Woods about it for me (205). Mr. Barr said he had not taken it because it would put a Mr.

Diggle in competition with him. They were both A–1 vet- [fol. 35] erans with status, and he, by retaining his civil service permanent status, would be in a higher competitive position than Mr. Diggle (205). I frequently discussed other personnel of the office with Mr. Barr (206). In general he felt that Mr. Madigan did not cooperate with him in his administrative goals. He said that it was impossible for him to fire Mr. Madigan (207), but that it was his desire to "get rid of Mr. Madigan" (207–208). He was constantly seeking for a method to get rid of Mr. Madigan (208).

Cross-examination.

By Mr. Fennell:

Mr. Barr did not tell me to go to Mr. Woods and get permission. I never talked to Mr. Woods about the program at all (210). It was not contemplated that I would return to permanent status (211). I talked to Mr. Barr relative to Mr. Madigan in 1953 when he asked me to come back to the agency (212–213). In 1953 he told me of his plan to fire Mr. Madigan (213). It was about the time this case was breaking in the newspapers. At the time Mr. Madigan and Mrs. Matteo were not suspended (214). It was before I read about Senator Williams' speech in the newspapers (215). I talked to Mr. Madigan at the office at the same time (215).

BURNHAM W. DIGGLE, being first duly sworn, testified as follows:

Direct examination.

By Mr. Scott:

In 1950 I was employed in the Office of Housing Expediter as Deputy Housing Expediter for Operations. I knew, in June of 1950, of the financial difficulties that the agency was having (217). I heard Mr. Madigan's proposal discussed in staff meeting (218). I asked to be processed under the plan at the very last moment. I discussed it with the Director of the Agency, Tighe Woods. I asked him whether it was all right for me to do it (218). He approved it (219).

WILLIAM G. BARR, the defendant, on being called as a witness by counsel for plaintiffs, having previously been sworn, testified as follows:

Direct examination.

By Mr. Scott:

I recommended to Mr. Woods that the position of Deputy Director for Administration be abolished (223). My memorandum so recommending was dated May 26, 1950 (223). At [fol. 36] the February 5, 1953 conference with Mrs. Matteo and Mr. Madigan, I told them that I intended to suspend them on the 9th (225). Before the conference, the matter had been discussed with members of my staff, Congressman Thomas, and several other people and I took the action as head of the agency (226). The matter had also been discussed with Ross Scherer, Acting Director of ESA, the parent agency of ORS, on February 4 (228). I told him that I was going to take suspension action against whom I considered to be the responsible people (228).

Mr. Toomey on behalf of defendant referred the Court to a Joint Resolution approved on June 29, 1950 (64 Stat. 302), which made applicable to the Office of Housing Expediter the provisions of the General Appropriation Act, 1951, as passed by the House of Representatives on May 10, 1950, and this included the Thomas Amendment (232–235).

Mr. Barr then resumed his testimony as follows:

I decided to take disciplinary action because of the criticism that was being presented against the agency (242). I would not have taken any disciplinary action if I had not been confronted with criticism against the agency (242). In my opinion the letter to Senator Williams defended the plan and that it was not my position in the matter (243). I am sure that I would not have taken any action had not this matter become a public issue and where the agency as well as myself were thrown in the light of defending a plan which I felt was improper (245). I acknowledge that during the course of the administrative hearing with respect to the suspensions I said that Mr. Scherer had called me about the matter and I told him that I was contemplating disciplinary action because I felt there was no defense for the plan and I had to protect the integrity of the agency and because of

my personal position in the matter and the letter had been sent to Senator Williams without my knowledge (245-249).

Cross-examination.

By Mr. Fennell:

In 1950 I had a staff member, Ben Yoshioka, survey the agency with respect to the organization and on the basis of it made recommendations (250-252).

Exhibit 8 was introduced on behalf of the defendant to [fol. 37] show that Mr. Barr was Acting Director in February 1953 (252–255); these included the following: a June 4, 1952 memorandum from Tighe Woods to all ORS employees appointing Barr as Deputy Director of Rent Stabilization; a January 31, 1953, letter from Economic Stabilization Director Michael V. DiSalle appointing Barr as Acting Director of ORS effective at the opening of business on February 9, 1953; a February 2, 1953 memorandum designating Barr as Acting Director on February 2 through 6 during the absence of the Director Henderson; General Order 9, as amended, setting forth the organization of ORS; and the job description of the Deputy Director of Rent Stabilization.

Defendant moved for a Directed Verdict on the basis of (1) truth, (2) there was no defamatory imputation in the press release, (3) there was a qualifiedly privileged occasion so that the plaintiffs had to prove malice (254–255). The Motion for Directed Verdict was denied (255). The Court also denied a Motion for Directed Verdict on the grounds of absolute privilege (260–261).

Linda A. Matteo, recalled as a witness by counsel for plaintiffs and having been previously sworn, testified as follows:

Cross-examination.

By Mr. Fennell:

I was reinstated in my position on April 28 (267–268). I was reduced in force on April 30 when ORS was about to expire (268–270).

JOHN J. MADIGAN, recalled as a witness by counsel for plaintiffs and having been previously sworn, testified as follows:

Direct examination.

By Mr. Scott:

On February 5, 1953, my salary was $11,800 (275). I retired at $6,240 per year after working for the Government for 42 years (276–277).

Cross-examination.

By Mr. Fennell:

The suspension stood when the Economic Stabilization Administrator did not accept the Board's recommendation that it be revoked (282). I elected to retire rather than go back to ORS (286).

Called as character witnesses were Sophie Donine, William Weed, John T. McCarthy and Florence Ida Bloomberg (289–314).

[fol. 38] William G. Barr testified as to his net worth (323–325).

Both sides rested (325–380).

The jury was charged (383–401).

This statement has been prepared and is being filed in accordance with the provisions of Rule 75 (c) of the Federal Rules of Civil Procedure for inclusion in the record on appeal for this action to the United States Court of Appeals for the District of Columbia Circuit.

COLLOQUY ON THE DEFENDANT'S REQUESTED INSTRUCTION ON QUALIFIED PRIVILEGE

* * * The Court: Have you any requests for instruction? We will take the plaintiffs' first (315). * * *

* * * * * * *

The Court: * * *

* * * * * * *

* * * I will take the defendant's (317).

* * * * * * *

The Court: No. 3 raises the issue of qualified privilege.

Mr. Toomey: Yes, sir; it does (318).

• • • • • • •

Mr. Toomey: As Your Honor knows, we have asked for instruction on qualified privilege in this case, and principally in support of our position we cite to Your Honor the case of Dickens against the International Brotherhood of Teamsters and others, being 84 Appeals D. C. 51, 171 Federal (2d) at 21. In that case, Your Honor, starting with the general proposition——

The Court: I read the case, since you mentioned it.

Mr. Toomey: Yes, sir. We place specific emphasis on the language in the first full paragraph on page 24. We feel that that language is clearly applicable to this situation.

The Court: I do not doubt that the general principle is correctly stated there, and I wouldn't question it. The question is whether that principle applies to the situation.

Mr. Toomey: As I see it, it does apply to our case. We have here, as the testimony shows, not only congressional criticism but newspaper report of this congressional criti- [fol. 39] cism of the agency, and of an individual, the defendant, as a matter of fact. Therefore we take the position that the defendant has the duty and the right to publish a reply, if you will, to those charges or to the criticism, and in any manner commensurate with the manner of publication of the criticism. In this case, of course, the criticism was, as we have seen, in the newspapers and was widely published. Therefore we take the position that the defendant had the right and the duty, as head of the agency. That is our point, Your Honor (319–21).

• • • • • • •

Mr. Scott: I think the Washington Steamship Company case applies very clearly to the facts in this case.

The Court: That case holds there was no qualified privilege?

Mr. Scott: That there was no qualified privilege; that qualified privilege generally means when you make a report to somebody who can do something about it. This is comment.

The Court: I am going to rule that qualified privilege does not apply in this case, for two reasons: First, because this is not an occasion for qualified privilege; second, because even if qualified privilege did exist, it was destroyed by the teletype. Therefore I am going to deny the requested instruction of the defendant on that point (321–22).

* * * * * * *

JUDGE'S CHARGE TO THE JURY

* * * * * * *

The first issue to be determined by you is whether the statement issued by the defendant, and of which the plaintiffs complain, was in fact libelous as to them (383). * * *

* * * * * * *

* * * Under our law everyone has a right to say or write what he or she chooses, but with this important limitation: If without justification a person makes a defamatory statement concerning another person, he is responsible for the damages, if any, that he may have caused to that person. [fol. 40] Now, what is a defamatory or libelous statement? A defamatory or libelous statement is a statement that tends to harm the reputation of another person so as to lower him in the estimation of the community or to deter other persons from associating or dealing with him. Another definition of what constitutes a defamatory or libelous statement is that it is a statement that tends to bring another person into contempt, ridicule or disgrace (386–87).

* * * * * * *

Now going back to the statement issued to the press on February 5th, it is for you, ladies and gentlemen of the jury, to determine from a reading of the text of the statement, in the light of the surrounding facts concerning which testimony has been introduced, whether this statement was defamatory of the plaintiffs, that is, whether it tended to harm their reputation so as to lower them in the estimation of the community or to bring them into contempt, ridicule or disgrace. The question is, what would the statement reasonably mean to the average, ordinary person, or the man in

the street, as we call him, who might read this statement. Naturally the entire statement must be construed as a whole in order to decide this question. Consequently it is for you to decide in the light of the surrounding facts and circumstances, and upon a reading of the statement, what the ordinary person would have understood it to mean. That is the first important decision that you must make. Would this statement be understood as charging the plaintiffs with some reprehensible conduct, that is, a type of conduct that would bring them into contempt, ridicule or disgrace, or that would damage their reputation and lower them in the estimation of the community? If you construe the statement as conveying such a meaning, then the statement is defamatory and libelous and the plaintiffs are entitled to recover damages. If you construe the statement as meaning that no reprehensible action is attributed or ascribed to the plaintiffs that would bring disgrace, contempt or ridicule upon them, then this statement is not libelous and the plaintiffs are not entitled to recover (392–93).

* * * * * * *

[fol. 41] * * * If you should find that the defendant acted with what the law calls "express malice," then you have a right, in your discretion, if you choose to do so—and that is entirely in your discretion—to award, in addition to compensatory damages, a further sum that the law calls "punitive damages."

Now, then, what constitutes malice? Express malice means a desire and an intention to harm the person concerning whom the defamatory statement is made, for personal spite, ill will or hostility toward him, coupled with an intent to injure him. But express malice is not limited to that. Even if there is no malevolence or ill will or antagonism or hostility towards the individual, a wanton, willful or reckless disregard of the rights of the person concerning whom the statement is made may also be considered as malice. The law permits you to do that. Malice, of course, is a state of mind, and therefore it cannot be proven directly, because no one can fathom the operations of the mind of another human being. Presence or absence of malice may be inferred from circumstances, from things said, from things done, from the surrounding circumstances, as well

as from the testimony of the person himself whose state of mind is in issue.

Whether or not to award punitive damages is entirely within the discretion of the jury. The jury has a right to award punitive damages, or not, as it sees fit. I want to explain to you that punitive damages may be awarded as a punishment to a defendant, or as a deterrent or example to others, or both. The amount that should be awarded as punitive damages, if punitive damages are to be awarded at all, is also entirely within the discretion of the jury. In determining whether to award punitive damages, and in determining the amount of such damages, the jury may consider all of the circumstances, the motives of the defendant, the intent with which he made the statement, the presence or absence of provocation or reasonable ground for making the statement, the extent of the injury sustained by the plaintiff, as well as the financial means of the defendant (395–96).

* * * * * * *

[fol. 42] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,217

WILLIAM G. BARR, Appellant,

v.

LINDA A. MATTEO, Appellee.

No. 13,218

WILLIAM G. BARR, Appellant,

v.

JOHN J. MADIGAN, Appellee.

Before: Edgerton, Chief Judge, in Chambers.

ORDER CONSOLIDATING CASES—March 26, 1956

Upon consideration of appellant's motion to consolidate the above cases and it appearing that no objections thereto have been filed, it is

Ordered that the above cases be, and they are hereby, consolidated for the purpose of filing briefs, of filing a single joint appendix and for hearing.

Dated: March 26, 1956.
Enter H. W. E., Chief Judge.

[fol. 43] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13217

WILLIAM G. BARR, Appellant

v.

LINDA A. MATTEO, Appellee

No. 13218

WILLIAM G. BARR, Appellant

v.

JOHN J. MADIGAN, Appellee

Appeals from the United States District Court for the District of Columbia

Mr. Paul A. Sweeney, Attorney, Department of Justice, with whom *Assistant Attorney General Doub* and *Messrs. Oliver Gasch,* United States Attorney, and *Joseph Langbart,* Attorney, Department of Justice, were on the brief, for appellant.

Mr. Byron N. Scott, with whom *Mr. Richard A. Mehler* was on the brief, for appellees.

[fol. 44] OPINION—May 2, 1957

Before EDGERTON, Chief Judge, and FAHY and DANAHER, Circuit Judges.

EDGERTON, *Chief Judge:* In 1953 the defendant Barr was Acting Director of the Office of Rent Stabilization, a branch of the Economic Stabilization Agency. The head of the Agency was the Director of Economic Stabilization. The plaintiffs Madigan and Matteo were employees

in the Office of which the defendant was Acting Director. A terminal-leave plan which the plaintiffs had sponsored in 1950 was under criticism in Congress in 1953. The defendant had disapproved of the plan. Without his knowledge, his secretary signed the defendant's name to a letter to a Senator defending the plan. The plaintiff Madigan had drafted the letter. When the defendant learned that the letter had gone out over his signature, he issued a press release in which he said his first act of duty would be to suspend the plaintiffs, the officials responsible for the terminal-leave plan, and that although he "was advised" the plan was legal, he thought it "violoated the spirit of the Thomas Amendment" and he "violently opposed it".

The plaintiffs sued the defendant for libel. The verdict and judgment were for the plaintiffs. The defendant appeals on the ground that he had an "absolute immunity or privilege" in publishing the press release.

We agree with the District Court in overruling that contention. The defendant's decision to suspend the plaintiffs for what he thought, mistakenly or not, was sufficient cause, and his execution of any documents appropriate to that end, were probably within his general line of duty. If so, a letter to his official superiors explaining his decision would also have been within his general line of duty. *Cf. Farr* v. *Valentine,* 38 App. D.C. 413. So would an explanation addressed to the plaintiffs or to their representative. *Newbury* v. *Love,* —— U.S. App. D.C. ——, —— F. 2d —— (Feb. 28, 1957). But in [fol. 45] explaining his decision to the general public, the defendant went entirely outside his line of duty. If such an officer were to do such a thing in bad faith or with a bad motive, no sufficient public interest would require that he be protected. If the defendant had been a Cabinet officer, his public explanation might have been absolutely privileged. "It has been held that a Cabinet officer is absolutely privileged to publish defamation, not only in doing his duty but also in discussing it; his defamation, to be protected, need only have 'more or less connection with the general matters committed by law to his control or supervision'." But this is because "Cabinet officers have political functions, and public interest is thought to re-

quire that they be not restrained by fear of libel suits from publicly explaining their acts and policies." *Colpoys* v. *Gates*, 73 App. D.C. 193, 194, 118 F. 2d 16, 17. We do not suggest that this principle is limited to Cabinet officers. We have no present occasion to consider whether it would apply, *e.g.*, to the Director of Economic Stabilization, who was appellant's official superior, or to the Chairman of the Atomic Energy Commission, or to other officers whose positions are comparable to those of Cabinet officers. Appellant's position was not of that sort. We held in *Colpoys* that a United States Marshal was not absolutely privileged to defame his subordinates in publicly explaining his reasons for dismissing them. Neither, we think, was an Acting Director of the Office of Rent Stabilization.

In general, "When the author of a libel writes under the compulsion of a legal or moral duty, or for the protection of his own rights or interests, that which he writes is a privileged communication unless the writer be actuated by malice." *Dickins* v. *Internat'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers*, 84 U.S. App. D.C. 51, 54, 171 F. 2d 21, 24. In the District Court the defendant Barr claimed that if his press release was not absolutely privileged, it was qualifiedly privileged by reason of this principle. However, on this appeal he has waived this claim. His brief states the "Question Presented" as follows: "Whether the Acting Director of the Office of Rent Stabilization should be accorded absolute immunity in a suit for libel for allegedly defamatory statements made by him in a press release, issued on Thursday, February 5, 1953, announcing his intention to suspend two [fol. 46] named employees of the agency on Monday, February 9, 1953, and setting forth his reasons for taking that action." The entire "Statement of Points" in his brief is as follows: "The District Court erred in denying the defendant's respective motions to dismiss and for a directed verdict which were based on the defense of absolute immunity or privilege."

The waiver of the claim of qualified privilege was informed and deliberate. The appellant was represented by eminent counsel. An Assistant Attorney General of the United States, the United States Attorney for the District of Columbia, and two attorneys of the Department of

Justice, all signed appellant's brief. All have now filed a memorandum which contains this summary of the matter: "Appellant's brief, in conformity with Rule 17(c)(7), set forth in the Statement of Points only the contention that the District Court erred in denying appellant's respective motions based on the defense of absolute immunity or privilege. Similarly, the Question Presented posed only this question, and the brief discusses this case only in terms of the applicability of absolute immunity as a defense. Finally, counsel for appellant, on October 12, 1956, disclaimed in open court any intent to urge any error on the part of the District Court other than its failure to accord to appellant the defense of absolute immunity or privilege."

This court's Rule 17(c)(7) requires that appellant's brief state "the points on which appellant intends to rely". Rule 17(i) provides that "Points not presented according to the rules of the court, will be disregarded, though the court, at its option, may notice and pass upon a plain error not pointed out or relied upon." This exception for "plain error" protects our authority to deal, in the interest of justice, with a point counsel have overlooked. In the absence of extraordinary circumstances the exception should not be applied, in a civil case, to a point that eminent counsel, for strategic or other reasons, have de- [fol. 47] liberately chosen to waive. Accordingly we do not consider whether there was plain error in the District Court's rejection of the claim of qualified privilege.

Affirmed.

DANAHER, *Circuit Judge, dissenting:* Appellant was the duly appointed Acting Director of the Office of Rent Stabilization at the time of the alleged libel. "All powers, duties and functions conferred on the President by Title II of the Housing and Rent Act of 1947, exclusive of section 208(a), as amended, and delegated to the Economic Stabilization Administrator by Executive Order No. 10276, shall be exercised and performed by the Director of Rent Stabilization pursuant to Executive Order No. 10276 and except as otherwise provided by this order."[1]

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[1] Sec. 4 of GO 9—Organization for Rent Stabilization, 16 FED. REG. 7630.

The declaration of policy of such an executive, as contained in the challenged press release, seems to me to be absolutely privileged. The appellant, exercising by redelegation the President's own powers, was entitled to immunity.[2] The official act was within the scope of those powers. The occasion was such as justified his action. The subject of the release dealt specifically with general matters committed by law to his control or supervision.

Appellee Madigan had been Deputy Housing Expediter in charge of personnel budget and fiscal matters within [fol. 48] the agency. Appellee Matteo had been responsible for all technical aspects of the personnel program including recruiting and classification, and had been adviser to the deputy for administration on procedures or policy matters. Mr. Madigan devised a plan, in which both appellees joined, whereby they "terminated themselves one day as permanent employees; received their lump sum accumulated annual leave; were rehired the next day; continued as temporary employees, with the intent to convert back to permanent employees at a later date." Appellant's intra-agency opposition to the plan was known.

Members of Congress publicly attacked the plan. Earlier criticism had been crystallized in the Thomas Amendment.[3] Appellant told appellees on February 5, 1953 "that the plan had become public, the agency was being bombarded with questions from newspapers and other forms of public media, that the agency was being subjected to severe criticism and that in order to protect the good name of the

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[2] DeArnaud v. Ainsworth, 24 App. D.C. 167, 178 (D.C. Cir. 1904); Glass v. Ickes, 73 App. D.C. 3, 117 F. 2d 273 (D.C. Cir. 1940), *cert. denied*, 311 U.S. 718 (1941); Mellon v. Brewer, 57 App. D.C. 126, 18 F. 2d 168 (D.C. Cir. 1927), *cert. denied*, 275 U.S. 530 (1927); cf. Gregoire v. Biddle, 177 F. 2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

[3] § 1212, General Appropriations Act, 1951, 64 STAT. 768, provided in part: "No part of the funds of, or available for expenditure by any corporation or agency included in this Act . . . shall be available to pay for annual leave accumulated by any civilian officer or employee during the calendar year 1950 and unused at the close of business on June 30, 1951 . . . ."

agency and myself I had to take disciplinary action against an act which I deemed improper."

Appellee Madigan two days earlier had prepared a letter to Senator Williams defending the plan. He did not attempt to see appellant about it, but forwarded the letter purporting to bear appellant's signature despite appellant's known opposition to the plan. Both appellees "took advantage" of the plan to use up the ear-marked funds.

Appellant testified that he decided to take disciplinary action "because I felt there was no defense for the plan [fol. 49] and I had to protect the integrity of the agency and because of my personal position in the matter and the letter had been sent to Senator Williams without my knowledge."[4]

The defense of this case was conducted by the Department of Justice. In the District Court appellant's motion for directed verdict was based in part on the ground that "the press release was qualifiedly privileged." The suit in last analysis, I take it, may be viewed as one against the Government which undoubtedly through Congress will be asked to respond to the judgement. I doubt that Government attorneys possess the power to waive a defense which, if it had been asserted, might have prevailed here. Compare our opinion in No. 13245—*Newbury* v. *Love*, decided February 28, 1957, where we found absolute privilege, despite *Colpoys* v. *Gates*.[5]

I see no obstacle in the *Colpoys* case to the result which I believe is required here. The limited functions of a marshal in publishing a statement in connection with the resignation of two deputies are not to be confounded with a situation such as the instant case presents. Even in *Colpoys* we recognized that officers with policy-determining functions are in a different category, and privilege is shown to have been accorded to acts in the general line of duty.

To recapitulate: here the Acting Director's status and authority stemmed from the President himself. His Executive Order made this agency head, in his own division, a policymaker second only to the Economic Stabilization

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[4] Cf. Dickins v. International Brotherhood, Etc., 84 U.S. App. D.C. 51, 171 F. 2d 21 (D.C. Cir. 1948).

[5] 73 App. D.C. 193, 118 F. 2d 16 (D.C. Cir. 1941).

Director. Involved, as a matter of top interest, was a policy position with reference to a plan admittedly devised to "use up" $2,600,000 of public funds which had been earmarked for terminal leave. If the appellant thought [fol. 50] the Madigan plan had been a perversion of an appropriation to ends beyond the intention of Congress in providing the funds, it was his duty to speak out. He was not alone in his appraisal of the untoward result. His press release did no more than seek to allay the serious challenge to the integrity of the agency and to attempt to restore a public confidence which the use of the plan had impaired. The subject matter was personal to him because his name had without authorization been affixed to an official letter which misrepresented his position. The whole congeries of occurrences, including the position the Acting Director intended to take with reference to the problem, became of vital concern to the public. Under such circumstances, the press release was entitled to the status of privilege.

We need not, indeed I do not seek to, relax the rule which regards a cabinet officer as "absolutely privileged to publish defamation, not only in doing his duty but also in discussing it; his defamation, to be protected, need only have 'more or less connection with the general matters committed by law to his control or supervision.'"[6] I think we should hold only that this officer, on the facts here disclosed, acting in the name of the President and exercising, by redelegation, powers conferred upon him by statute, and possessed of policy-making functions, is immune on account of a policy statement issued within the scope of his authority as to a matter committed by law to his control.

In this view, I think the judgment should be reversed.

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[6] Colpoys v. Gates, *supra* note 5, 73 App. D.C. at 194, 118 F. 2d at 17, citing Spalding v. Vilas, 161 U.S. 483, 498 (1896).

[fol. 51] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1957.

C. A. 3221-53

No. 13,217

WILLIAM G. BARR, Appellant,

v.

LINDA A. MATTEO, Appellee.

No. 13,218

WILLIAM G. BARR, Appellant,

v.

JOHN J. MADIGAN, Appellee.

Appeals from the United States District Court for the District of Columbia

Before: Edgerton, Chief Judge, and Fahy and Danaher, Circuit Judges.

JUDGMENT—May 2, 1957

These appeals came on to be heard on the record from the United States District Court for the District of Columbia, and were argued by counsel.

On Consideration Whereof, It is ordered and adjudged by this Court that the order of the said District Court appealed from in these cases be, and it is hereby, affirmed.

It is further Ordered by the Court that each party in these cases shall bear his own costs on these appeals.

Dated: May 2, 1957.

Per Chief Judge Edgerton.

Separate dissenting opinion by Circuit Judge Danaher.

[fol. 52] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,217

WILLIAM G. BARR, Appellant,

v.

LINDA A. MATTEO, Appellee.

No. 13,218

WILLIAM G. BARR, Appellant,

v.

JOHN J. MADIGAN, Appellee.

Before: Edgerton, Chief Judge, and Fahy, Circuit Judge, in Chambers.

ORDER MODIFYING OPINION—June 6, 1957

It is ordered by the Court that the opinion of this Court in the above cases be modified by striking the following words beginning on the fifteenth line of the third page:

"We held in that case"

and by inserting in lieu thereof the following words:

"We do not suggest that this principle is limited to Cabinet officers. We have no present occasion to consider whether it would apply, *e.g.,* to the Director of Economic Stabilization, who was appellant's official superior, or to the Chairman of the Atomic Energy Commission, or to other officers whose positions are comparable to those of Cabinet officers. Appellant's position was not of that sort. We held in *Colpoys*"

Per Curiam.

Dated: June 6, 1957.
Enter H. W. E., Chief Judge.

[fol. 53] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,217

WILLIAM G. BARR, Appellant,

v.

LINDA A. MATTEO, Appellee.

No. 13,218

WILLIAM G. BARR, Appellant,

v.

JOHN J. MADIGAN, Appellee.

Before: Edgerton, Chief Judge, Prettyman, Wilbur K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

ORDER DENYING PETITION FOR REHEARING—June 6, 1957

Upon consideration of appellant's petition for a rehearing in banc, it is

Ordered by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: June 6, 1957.

Circuit Judges Washington, Bastian and Burger did not participate in the foregoing order.

Circuit Judge Miller would grant the petition.

Enter H. W. E., Chief Judge.

[fol. 54] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13217

WILLIAM G. BARR, Appellant

v.

LINDA A. MATTEO, Appellee

No. 13218

WILLIAM G. BARR, Appellant

v.

JOHN J. MADIGAN, Appellee

On Reargument Pursuant to Remand by the Supreme Court of the United States

Mr. Paul A. Sweeney, Attorney, Department of Justice, with whom *Assistant Attorney General Doub, Messrs. Oliver Gasch,* United States Attorney, and *Joseph Langbart,* Attorney, Department of Justice, were on the brief, for appellant.

Mr. Byron N. Scott, with whom *Mr. Richard A. Mehler* was on the brief, for appellees.

[fol. 55] OPINION—Decided June 12, 1958

Before EDGERTON, *Chief Judge,* and FAHY and DANAHER, *Circuit Judges.*

PER CURIAM: The case is before us a second time. In our earlier decision, *Barr* v. *Matteo,* 100 U.S. App. D.C. 319, 244 F. 2d 767, where the facts are set forth more fully, we held that appellant, defendant in the District Court, could not successfully defend the libel suit of appellees, plaintiffs, on the basis of an absolute privilege. For reasons stated by the majority we did not pass upon the District Court's rejection of appellant's claim of a qualified privilege. The Supreme Court granted certiorari and remanded the case to us "with directions to pass upon

petitioner's claim of a qualified privilege." *Barr* v. *Matteo*, 355 U.S. 171, 173. On this remand the case has been briefed and argued again.

A qualified privilege exists "when a communication relates to a matter of interest to one or both of the parties to the communication and when the means of publication adopted are reasonably adapted to the protection of that interest." *Blake* v. *Trainer*, 79 U.S. App. D.C. 360, 362, 148 F. 2d 10, 12. We now hold that appellant had a qualified privilege as Acting Director of the Office of Rent Stabilization to publish a defense of his conduct and that of his organization.

Several questions remain. One is whether appellant stayed within his qualified privilege or lost it by excessiveness of publication of the press release in suit. As to this we think that in view of the widespread public nature of the criticism of the Agency the scope of dissemination of the press release was not excessive. Another question is whether the qualified privilege which otherwise existed did not apply because the press release was aimed at appellees rather than at the source of the criticism of the Agency, which was in the Congress of the United States. We think that appellees were so connected with the subject matter of the press release that reference to them did not destroy the privilege. This situation is different from those cited by appellees where the defendants seem to have gone out [fol. 56] of their way to libel the plaintiffs.[1] See *Etchison* v. *Pergerson*, 88 Ga. 620, 15 S.E. 680.

This brings us to the questions whether appellant lost the privilege (1) by reason of malice or (2) lack of reasonable ground to believe that the content of his publication was true; or both. These are jury questions, as to which we hold there was sufficient evidence to go to the jury. Since they were not submitted to the jury our reversal will be accompanied by a remand for further proceedings not inconsistent with this opinion.

It is so ordered.

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[1] *Merchants' Ins. Co.* v. *Buckner*, 98 Fed. 222, 232, (6th Cir.); *Williams* v. *McManus*, 38 La. Ann. 161, 58 Am. Rep. 171.

[fols. 57-60] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1958.

C. A. 3221-53

No. 13,217

WILLIAM G. BARR, Appellant,

v.

LINDA A. MATTEO, Appellee.

No. 13,218

WILLIAM G. BARR, Appellant,

v.

JOHN J. MADIGAN, Appellee.

On Reargument pursuant to Remand by the Supreme Court of the United States.

Before: Edgerton, Chief Judge, and Fahy and Danaher, Circuit Judges.

JUDGMENT—June 12, 1958

Pursuant to the judgment of the Supreme Court of the United States dated December 9, 1957, these cases came on for reargument on the record from the United States District Court for the District of Columbia, and were reargued by counsel.

On Consideration Whereof, it is ordered and adjudged by this Court that the judgments of the said District Court appealed from in these cases be, and they are hereby, reversed, and that these cases be, and they are hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

It is further Ordered by the Court that each party in these cases shall bear his own costs on these appeals.

Dated: June 12, 1958.

Per Curiam.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 61] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1958

No. 350

WILLIAM G. BARR, Petitioner,

vs.

LINDA A. MATTEO AND JOHN J. MADIGAN

ORDER ALLOWING CERTIORARI—December 15, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and one and one-half hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this application.

No. 350

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM G. BARR, PETITIONER

v.

LINDA A. MATTEO AND JOHN J. MADIGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
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CITATIONS

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No.

WILLIAM G. BARR, PETITIONER

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LINDA A. MATTEO AND JOHN J. MADIGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of William G. Barr, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cases on June 12, 1958.[1] This judgment was entered after remand by this Court, by an order dated December 9, 1957 (355 U.S. 171), which vacated the judgment of the Court of Appeals of May 2, 1957, and directed that court to pass upon an issue not previously considered by it.

[1] Petitioner has been represented by the Department of Justice throughout this proceeding pursuant to 5 U.S.C. 309. See *Booth* v. *Fletcher*, 101 F. 2d 676 (C.A. D.C.), certiorari denied, 307 U.S. 628.

The cases were consolidated on appeal, by order of the Court of Appeals of March 26, 1956, because of the identity of the factual and legal issues (R. 42). A single petition is filed in accordance with Rule 23 (5) of the rules of this Court.

OPINIONS BELOW

The United States District Court for the District of Columbia rendered no opinion. The original opinion of the Court of Appeals, dated May 2, 1957, as modified by its order of June 6, 1957 (App., *infra*, pp. 15-24) is reported at 244 F. 2d 767. The *per curiam* opinion of this Court, dated December 9, 1957, vacating the judgment of the Court of Appeals and remanding the case to that court for further consideration, is reported at 355 U.S. 171. The opinion of the Court of Appeals upon remand (App., *infra*, pp. 26-28) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1958 (App., *infra*, pp. 29-30). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the absolute immunity from defamation suits, accorded officials of the Government with respect to acts done within the scope of their official authority, extends to statements to the press by high policy-making officers, below cabinet or comparable rank, concerning matters committed by law to their control or supervision.

STATEMENT

This is a libel suit instituted by respondents, former employees of the Office of Rent Stabilization, against petitioner, who was the Acting Director of that Office, based on matters contained in an official press release issued by the latter on February 5, 1953. The press release related to a then-current congressional inquiry concerning a terminal-leave plan which had been de-

vised by the respondents in 1950 for employees of the agency. The factual background of the case was summarized in the prior petition (No. 409, 1957 Term) and, for the convenience of the Court, will be set forth again here.

1. *The terminal-leave plan.* In May 1950, reduction-in-force notices were issued to personnel of the Office of Housing Expediter, an independent executive agency and the predecessor of the Office of Rent Stabilization, since the agency's statutory existence was about to expire. Respondent Madigan, who was Deputy Director in charge of personnel and fiscal matters, and respondent Matteo, chief of the personnel branch, devised a plan which was designed to utilize $2,600,000 (which had been earmarked in the agency's appropriation for the fiscal year 1950 exclusively for terminal-leave payments) as a means of conserving funds for future operational needs should the agency's life be extended (R. 14, 17). The purpose of the plan was to avoid a large terminal-leave carry-over into the next fiscal year which otherwise might have been paid out of the agency's general funds. The plan provided that employees of the agency would be discharged pursuant to the existing reduction-in-force notices, receive payment for accrued annual leave out of the terminal-leave appropriations, be rehired the following day as temporary employees, and be restored to permanent status if the life of the agency were extended (R. 14-15, 17).

Petitioner, who was then General Manager of the Office of Housing Expediter, was opposed to the plan on the ground that it violated the spirit of the so-called Thomas Amendment to the General Appropriation Act, 1951, 64 Stat. 768, which required government employees to use their annual leave within a specified time

and prohibited payments for unused annual leave accumulated during the calendar year 1950 (R. 15). The Housing Expediter decided against general adoption of the plan, but, when Mrs. Matteo advised him that some of the employees desired to take advantage of it, he gave permission for the plan to be utilized by any such volunteers (R. 18, 19). On June 23, 1950, Congress extended the authority of the Office of Housing Expediter to June 30, 1951, and two days later the terminal leave plan was put into effect for forty-nine employees of the agency, including the respondents (R. 14, 18, 21).[2]

2. *The press release.* On January 28, 1953, Senator John J. Williams of Delaware wrote to the Office of Rent Stabilization (successor to the Office of Housing Expediter) inquiring as to the 1950 terminal-leave payments (R. 19-20). The letter came to the attention of respondent Madigan, who prepared a preliminary draft of a reply to Senator Williams defending the plan (R. 20). The draft was not brought to the attention of petitioner, who was at that time the Acting Director of the agency (R. 16, 20). The letter was prepared in final form and sent to petitioner's office for his signature, but in his absence his name was signed by the Director's secretary and the letter was delivered to Senator Williams on the morning of February 3 (*ibid.*).

The following day, Senator Williams on the floor of the Senate delivered a speech criticizing the 1950 terminal-leave payments and requesting that the matter

[2] Respondent Madigan has since sued in the Court of Claims to recover the amount of terminal-leave payments due him under the plan. The Court of Claims recently held that the plan was not in violation of law. *Madigan* v. *United States*, No. 262-53, June 4, 1958. A motion for a new trial has been filed by the Government.

be investigated by a congressional committee (R. 3, 16). Senators Ferguson, Dirksen, and McCarthy joined in the denunciation of the leave payments as a "conspiracy to defraud the Government" and a "raid on the Treasury". 99 Cong. Rec. 868-71. These comments received wide publicity (R. 3, 4) and petitioner was questioned about the plan by newspapers and other interested parties (R. 16).

On February 5, petitioner advised the respondents that, because of the criticism of himself and the Office of Rent Stabilization, the adverse publicity, and the need to protect himself and safeguard the interests of the agency, he was going to take disciplinary action (R. 16, 20, 22). He thereupon served them with letters expressing his intention to suspend them on February 9, the date when his appointment as Acting Director became effective.[3] Contemporaneously, at petitioner's direction, the Office of Rent Stabilization issued the following press release which is the subject matter of this litigation (R. 5-6):

> William G. Barr, Acting Director of Rent Stabilization, today served notice of suspension on the two officials of the agency who in June 1950 were responsible for the plan which allowed 53 of the agency's 2,681 employees to take their accumulated annual leave in cash.
>
> Mr. Barr's appointment as Acting Director becomes effective Monday, February 9, 1953 and the suspension of these employees will be his first

[3] Petitioner had been appointed Acting Director effective February 9, 1953, when the resignation of Director James Henderson was to become effective. When the press release was issued, petitioner was Acting Director by designation of Mr. Henderson, who was then absent from Washington (R. 24).

act of duty. The employees are John J. Madigan, Deputy Director for Administration, and Linda Matteo, Director of Personnel.

"In June 1950," Mr. Barr stated, "my position in the agency was not one of authority which would have permitted me to stop the action. Furthermore, I did not know about it until it was almost completed.

"When I did learn that certain employees were receiving cash annual leave settlements and being returned to agency employment on a temporary basis, I specifically notified the employees under my supervision that if they applied for such cash settlements I would demand their resignations and the record will show that my immediate employees complied with my request.

"While I was advised that the action was legal, I took the position that it violated the spirit of the Thomas Amendment and I violently opposed it. Monday, February 9th, when my appointment as Acting Director becomes effective, will be the first time my position in the agency has permitted me to take any action on this matter, and the suspension of these employees will be the first official act I shall take."

Mr. Barr also revealed that he has written to Senator Joseph McCarthy, Chairman of the Committee on Government Operations, and to Representative John Phillips, Chairman of the House Subcommittee on Independent Offices Appropriations, requesting an opportunity to be heard on the entire matter.

3. *The proceedings below.* Shortly after the issuance of the press release, this suit was brought, charging that

the release was a malicious libel causing damage to respondents (R. 1-6). Petitioner's motion to dismiss the complaint on the ground of absolute privilege was overruled by the District Court on the authority of *Colpoys* v. *Gates*, 118 F. 2d 16 (C.A.D.C.) (R. 7). Petitioner then filed an answer (R. 8-9, 12-13), and a jury trial was held. After respondents had submitted evidence in support of their claim of liability, petitioner moved for a directed verdict on the grounds of (1) truth, (2) no defamatory imputation, and (3) qualified privilege. This motion was denied. The District Court also denied a motion for a directed verdict on the ground of absolute privilege. It refused to give instructions on the defense of truth and qualified privilege and instructed the jury to return a verdict for respondents if it found that petitioner's statements were defamatory. A verdict was returned in favor of respondents in the amounts of $6,500 and $2,000, respectively.

On appeal to the Court of Appeals for the District of Columbia Circuit, the sole issue raised by petitioner was whether the issuance of the press release was absolutely privileged (App., *infra*, p. 16). At the request of the Court of Appeals, and after argument, each party filed a memorandum on the question of whether the court could nevertheless consider the issue of qualified privilege. Petitioner urged that the question could be considered by the court under its Rule 17(i), which provides that "the court, at its option, may notice and pass upon a plain error not pointed out or relied upon." The court concluded, however, that since the waiver was "informed and deliberate," the rule invoked on petitioner's behalf was not applicable

and the decision would be confined to the issue of absolute privilege (App., *infra*, pp. 17-19).

On the merits, the court (Judge Danaher dissenting) affirmed the judgment against petitioner. The majority opinion (by Chief Judge Edgerton, with Judge Fahy concurring) recognized that petitioner's decision to suspend respondents "probably [was] within his general line of duty," but held that petitioner "in explaining his decision to the general public * * * went entirely outside his line of duty" (App., *infra*, p. 16). The majority stated that, "if the defendant had been a Cabinet officer, his public explanation might have been absolutely privileged" (App., *infra*, pp. 16-17), but that in this respect the Acting Director of the Office of Rent Stabilization was not different from the United States Marshal involved in *Colpoys* v. *Gates*, 118 F. 2d 16 (C.A.D.C.). The majority subsequently modified its opinion to declare that the principle of absolute privilege was not necessarily limited to cabinet officers but might include other officers who held comparable positions (App., *infra*, p. 24).

Judge Danaher, in dissenting (App., *infra*, pp. 19-22), stressed the fact that petitioner, as Acting Director of the Office of Rent Stabilization, had been delegated all of the powers, duties and functions conferred on the President by Title II of the Housing and Rent Act of 1947, 61 Stat. 193. In Judge Danaher's view, the press release was no more than a declaration of policy by a policy-making executive with respect to a matter committed by law to his control or supervision.

Petitioner thereafter applied to this Court for a writ of certiorari, raising the question of whether the press release was protected by an absolute privilege (No. 409, 1957 Term). The Court granted the petition, vacated

the judgment of the Court of Appeals, and remanded the case to that court "with directions to pass upon petitioner's claim of a qualified privilege." 355 U.S. 171, 173. The Court ruled that the question of absolute privilege should not have been reached by the Court of Appeals without first considering the narrower defense of qualified privilege which might have been adequate to a disposition of the case. It was observed that "the defense of qualified privilege was consistently pressed in the District Court and in fact urged in the Court of Appeals itself." 355 U.S. at 173.

On remand, the Court of Appeals held that petitioner's statements were protected by a qualified privilege and that the privilege was not lost by an excessive publication or by a specific reference in the press release to the respondents (App., *infra*, pp. 26-28). However, it further held that there was sufficient evidence in the record to warrant submitting to the jury the questions of whether the privilege was lost by reasons of (1) malice or (2) lack of reasonable grounds for believing that the content of the publication was true. Since the District Court's treatment had made it unnecessary to submit these issues to the jury, the case was reversed and remanded "for further proceedings not inconsistent with this opinion." App., *infra*, p. 28.

REASONS FOR GRANTING THE WRIT

1. The first decision of the Court of Appeals in this case, denying petitioner the defense of absolute privilege, is a significant ruling in the increasingly important field of the immunity of federal officials from civil liability in defamation.

Our reasons for concluding that the decision merits

consideration by this Court were set forth in the petition to review that judgment (No. 409, 1957 Term). We asserted that the holding of the Court of Appeals —that the issuance of an official press release by the head of an independent agency of the executive department is not absolutely privileged—constitutes a departure from the consistent pattern of decisions of various lower courts according immunity to acts of government officers within the scope of their official authority, and that the holding conflicts with the principles of this Court's decision in *Spalding* v. *Vilas*, 161 U.S. 483, from which this pattern of cases has developed. We stated that the effect of the decision will be to hamper seriously the ability of policy-making officials below cabinet rank to engage in public discussion of the affairs of government, although those officials, in view of the present complexity of governmental operations, must of necessity constitute the major source of information concerning public affairs. In addition, we pointed out that the decision leaves the law in a state of confusion on a subject which has not received the attention of this Court since its decision in *Spalding* v. *Vilas, supra.*

The present decision of the Court of Appeals, remanding the case to the District Court for a new trial, underscores the importance of the case. For the decision now requires petitioner to do precisely what we have contended the rule of absolute immunity is designed to avoid, *i.e.*, litigate in a trial before a jury the question of his motivation in taking the official action which he deemed necessary to meet the responsibilities of his office. Furthermore, the Court has recently granted certiorari in a case involving the same basic issue although arising in a somewhat different context.

Howard v. *Lyons*, 250 F. 2d 912 (C.A. 1), certiorari granted, 357U. S. 903, No. 57, this Term. In *Howard*, the Court of Appeals for the First Circuit held that an executive officer below cabinet rank does not have absolute immunity with regard to the communication to interested Congressmen of copies of an official report addressed to his superior officers, despite the fact that the officer had been performing his executive functions in making the communication.

In this case, unlike *Howard*, the court below found that petitioner had gone "outside his line of duty" in issuing the press release. Perhaps in terms, therefore, the court adhered to the general principle that authorized acts are absolutely privileged. But it did so only by adopting an artificially restrictive test of "line of duty." It seems indisputable that petitioner was acting within the scope of his authority in giving full publicity to his agency's position on the terminal-leave plan and to the disciplinary action which he proposed to take. The issuance of press releases was a regular practice of the Office of Rent Stabilization.[4] The agency supervised and enforced federal rent control and operated pursuant to a very broad delegation of presidential authority. See 16 Fed. Reg. 7630. And as Director of the organization, petitioner had full responsibility for its internal management and control over its several thousand employees.

In *Spalding* v. *Vilas, supra*, this Court held that, in order to receive the protection of immunity, it was not necessary that the official be under a positive legal duty to act, but it was sufficient that general legal authority for the act existed—*i.e.*, that the statements have "more

[4] See Rourke, *Law Enforcement Through Publicity*, 24 U. of Chi. L. Rev. 225, 233 (1957).

or less connection with the general matters committed by law to his control or supervision." 161 U. S. at 498-499. This was followed by the Court of Appeals for the District of Columbia Circuit in *Mellon* v. *Brewer*, 18 F. 2d 168, certiorari denied, 275 U. S. 530, holding that the release to newspapers of an official letter from the Secretary of the Treasury to the President was absolutely privileged although the President had not requested the report, for "it certainly was not beyond the scope of the Secretary's duty and authority to submit one." 18 F. 2d at 171. See also *Cooper* v. *O'Connor*, 99 F. 2d 135, certiorari denied, 305 U. S. 643.

Judged by these standards, petitioner's issuance of the press release was clearly within the scope of his authority. It follows, therefore, that this case squarely presents the same fundamental question now pending before the Court in *Howard*, namely, whether statements made by a federal officer below cabinet level, in performing the functions of his office, are absolutely immune from liability in defamation. The same considerations which prompted the Court to grant certiorari in *Howard* call for a like disposition of this petition.[5]

2. As already noted (*supra* pp. 8-9), this Court previously granted a petition for certiorari in this case, vacated the original judgment of the Court of Appeals, and directed that court to pass upon petitioner's claim

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[5] See also *Glass* v. *Ickes*, 117 F. 2d 273 (C.A. D.C.), certiorari denied, 311 U.S. 718; *United States* v. *Brunswick*, 69 F. 2d 383 (C.A. D.C.); *Farr* v. *Valentine*, 38 App. D.C. 413; *DeArnaud* v. *Ainsworth*, 24 App. D.C. 167, appeal dismissed, 199 U.S. 616; *Carson* v. *Behlen*, 136 F. Supp. 222 (D. R.I.); *Tinkoff* v. *Campbell*, 86 F. Supp. 331 (N.D. Ill.); *Harwood* v. *McMurtry*, 22 F. Supp. 572 (W.D. Ky.); *Miles* v. *McGrath*, 4 F. Supp. 603 (D. Md.); cf. *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949.

of a qualified privilege, 355 U.S. 171. The Court ruled that the Court of Appeals had erred in holding petitioner to his original waiver of that narrowed defense. The reason for this disposition was that "this Court should avoid rendering a decision beyond the obvious requirements of the record." 355 U.S. at 172.

This procedural objection to further review of the case has now been removed, and the important question of absolute immunity now arises on the record. The Court of Appeals has considered the defense of qualified privilege on the basis of the record before it and has decided that the record does not permit a determination of the issue. The court found that there was sufficient evidence to go to a jury on the question of whether the qualified privilege had been lost by reason of malice or by lack of reasonable grounds for believing that the content of the publication was true. Accordingly, since the District Court had not submitted these questions to the jury at the first trial, the Court of Appeals directed that a second trial be conducted (App., *infra*, p. 28).

The present procedural posture of this case is thus identical to that of *Howard* v. *Lyons, supra.* (See the petition in No. 57, this Term, pp. 12-14.) In each case, the Court of Appeals has held that the federal officer did not have the benefit of an absolute privilege, that his statements were entitled to a qualified privilege, and that the case had to be remanded to the District Court for a jury trial on whether the privilege had been lost by abuse. In its prior order in the instant case, this Court did not direct that a second trial be conducted but only that the Court of Appeals attempt finally to dispose of the litigation on the narrower ground of qualified privilege, if possible. This the

court below has been unable to do, so that the important question of whether a federal officer must be subjected to a trial of his motives, in order to justify his official acts, is now squarely presented to this Court for decision.

CONCLUSION

For the foregoing reasons, and the reasons given in the petition in No. 409, 1957 Term, it is respectfully submitted that this petition for a writ of certiorari should be granted. However, in view of the similarity of the issue in this case to that in *Howard* v. *Lyons, supra,* the Court may deem it appropriate to withhold action on this petition until the *Howard* case is decided.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

MORTON HOLLANDER,
BERNARD CEDARBAUM,
Attorneys.

SEPTEMBER 1958.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13217

WILLIAM G. BARR, APPELLANT

v.

LINDA A. MATTEO, APPELLEE

No. 13218

WILLIAM G. BARR, APPELLANT

v.

JOHN J. MADIGAN, APPELLEE

Appeals from the United States District Court for the District of Columbia

Decided May 2, 1957

Mr. Paul A. Sweeney, Attorney, Department of Justice, with whom *Assistant Attorney General Doub* and *Messrs. Oliver Gasch,* United States Attorney, and *Joseph Langbart,* Attorney, Department of Justice, were on the brief, for appellant.

Mr. Byron N. Scott, with whom *Mr. Richard A. Mehler* was on the brief, for appellees.

Before EDGERTON, *Chief Judge,* and FAHY and DANAHER, *Circuit Judges*

EDGERTON, *Chief Judge:* In 1953 the defendant Barr was Acting Director of the Office of Rent Stabilization, a branch of the Economic Stabilization Agency. The head of the Agency was the Director of Economic Stabilization. The plaintiffs Madigan and Matteo were

employees in the Office of which the defendant was Acting Director. A terminal-leave plan which the plaintiffs had sponsored in 1950 was under criticism in Congress in 1953. The defendant had disapproved of the plan. Without his knowledge, his secretary signed the defendant's name to a letter to a Senator defending the plan. The plaintiff Madigan had drafted the letter. When the defendant learned that the letter had gone out over his signature, he issued a press release in which he said his first act of duty would be to suspend the plaintiffs, the officials responsible for the terminal-leave plan, and that although he "was advised" the plan was legal, he thought it "violated the spirit of the Thomas Amendment" and he "violently opposed it".

The plaintiffs sued the defendant for libel. The verdict and judgment were for the plaintiffs. The defendant appeals on the ground that he had an "absolute immunity or privilege" in publishing the press release.

We agree with the District Court in overruling that contention. The defendant's decision to suspend the plaintiffs for what he thought, mistakenly or not, was sufficient cause, and his execution of any documents appropriate to that end, were probably within his general line of duty. If so, a letter to his official superiors explaining his decision would also have been within his general line of duty. *Cf. Farr* v. *Valentine*, 38 App. D.C. 413. So would an explanation addressed to the plaintiffs or to their representative. *Newbury* v. *Love*, —— U.S. App. D.C. ——, —— F. 2d —— (Feb. 28, 1957). But in explaining his decision to the general public, the defendant went entirely outside his line of duty. If such an officer were to do such a thing in bad faith or with a bad motive, no sufficient public interest would require that he be protected. If the defendant had been a Cabinet

officer, his public explanation might have been absolutely privileged. "It has been held that a Cabinet officer is absolutely privileged to publish defamation, not only in doing his duty but also in discussing it; his defamation, to be protected, need only have 'more or less connection with the general matters committed by law to his control or supervision.'" But this is because "Cabinet officers have political functions, and public interest is thought to require that they be not restrained by fear of libel suits from publicly explaining their acts and policies." *Colpoys* v. *Gates*, 73 App. D.C. 193, 194, 118 F. 2d 16, 17.* We held in that case that a United States Marshal was not absolutely privileged to defame his subordinates in publicly explaining his reasons for dismissing them. Neither, we think, was an Acting Director of the Office of Rent Stabilization.

In general, "When the author of a libel writes under the compulsion of a legal or moral duty, or for the protection of his own rights or interests, that which he writes is a privileged communication unless the writer be actuated by malice." *Dickins* v. *Internat'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers*, 84 U. S. App. D. C. 51, 54, 171 F. 2d 21, 24. In the District Court the defendant Barr claimed that if his press release was not absolutely privileged, it was qualifiedly privileged by reason of this principle. However, on this appeal he has waived this claim. His brief states the "Question Presented" as follows: "Whether the Acting Director of the Office of Rent Stabilization should be accorded absolute immunity in a suit for libel for allegedly defamatory statements made by him in a press release, issued on Thursday, February 5, 1953, announcing his intention

[* The opinion was later modified at this point. See pp. ——, *infra*.]

to suspend two named employees of the agency on Monday, February 9, 1953, and setting forth his reasons for taking that action." The entire "Statement of Points" in his brief is as follows: "The District Court erred in denying the defendant's respective motions to dismiss and for a directed verdict which were based on the defense of absolute immunity or privilege."

The waiver of the claim of qualified privilege was informed and deliberate. The appellant was represented by eminent counsel. An Assistant Attorney General of the United States, the United States Attorney for the District of Columbia, and two attorneys of the Department of Justice, all signed appellant's brief. All have now filed a memorandum which contains this summary of the matter: "Appellant's brief, in conformity with Rule 17 (c) (7), set forth in the Statement of Points only the contention that the District Court erred in denying appellant's respective motions based on the defense of absolute immunity or privilege. Similarly, the Question Presented posed only this question, and the brief discusses this case only in terms of the applicability of absolute immunity as a defense. Finally, counsel for appellant, on October 12, 1956, disclaimed in open court any intent to urge any error on the part of the District Court other than its failure to accord to appellant the defense of absolute immunity or privilege."

This court's Rule 17 (c) (7) requires that appellant's brief state "the points on which appellant intends to rely". Rule 17 (i) provides that "Points not presented according to the rules of the court, will be disregarded, though the court, at its option, may notice and pass upon a plain error not pointed out or relied upon." This exception for "plain error" protects our authority to deal, in the interest of justice, with a point counsel have overlooked. In the absence of extraordinary circumstances the exception should not be

applied, in a civil case, to a point that eminent counsel, for strategic or other reasons, have deliberately chosen to waive. Accordingly we do not consider whether there was plain error in the District Court's rejection of the claim of qualified privilege.

Affirmed.

DANAHER, *Circuit Judge, dissenting:* Appellant was the duly appointed Acting Director of the Office of Rent Stabilization at the time of the alleged libel. "All powers, duties and functions conferred on the President by Title II of the Housing and Rent Act of 1947, exclusive of section 208 (a), as amended, and delegated to the Economic Stabilization Administrator by Executive Order No. 10276, shall be exercised and performed by the Director of Rent Stabilization pursuant to Executive Order No. 10276 and except as otherwise provided by this order."[1]

The declaration of policy of such an executive, as contained in the challenged press release, seems to me to be absolutely privileged. The appellant, exercising by redelegation the President's own powers, was entitled to immunity.[2] The official act was within the scope of those powers. The occasion was such as justified his action. The subject of the release dealt specifically with general matters committed by law to his control or supervision.

Appellee Madigan had been Deputy Housing Expediter in charge of personnel budget and fiscal matters

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[1] Sec. 4 of GO 9—Organization for Rent Stabilization, 16 FED. REG. 7630.

[2] *DeArnaud* v. *Ainsworth*, 24 App. D.C. 167, 178 (D.C. Cir. 1904); *Glass* v. *Ickes*, 73 App. D.C. 3, 117 F. 2d 273 (D.C. Cir. 1940), *cert. denied*, 311 U.S. 718 (1941); *Mellon* v. *Brewer*, 57 App. D.C. 126, 18 F. 2d 168 (D.C. Cir. 1927), *cert. denied*, 275 U.S. 530 (1927); cf. *Gregoire* v. *Biddle*, 177 F. 2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

within the agency. Appellee Matteo had been responsible for all technical aspects of the personnel program including recruiting and classification, and had been adviser to the deputy for administration on procedures or policy matters. Mr. Madigan devised a plan, in which both appellees joined, whereby they "terminated themselves one day as permanent employees; received their lump sum accumulated annual leave; were rehired the next day; continued as temporary employees, with the intent to convert back to permanent employees at a later date." Appellant's intra-agency opposition to the plan was known.

Members of Congress publicly attacked the plan. Earlier criticism had been crystallized in the Thomas Amendment.[3] Appellant told appellees on February 5, 1953 "that the plan had become public, the agency was being bombarded with questions from newspapers and other forms of public media, that the agency was being subjected to severe criticism and that in order to protect the good name of the agency and myself I had to take disciplinary action against an act which I deemed improper."

Appellee Madigan two days earlier had prepared a letter to Senator Williams defending the plan. He did not attempt to see appellant about it, but forwarded the letter purporting to bear appellant's signature despite appellant's known opposition to the plan. Both appellees "took advantage" of the plan to use up the earmarked funds.

Appellant testified that he decided to take disciplinary action "because I felt there was no defense for

[3] § 1212, General Appropriations Act, 1951, 64 STAT. 768, provided in part: "No part of the funds of, or available for expenditure by any corporation or agency included in this Act * * * shall be available to pay for annual leave accumulated by any civilian officer or employee during the calendar year 1950 and unused at the close of business on June 30, 1951 * * *."

the plan and I had to protect the integrity of the agency and because of my personal position in the matter and the letter had been sent to Senator Williams without my knowledge."[4]

The defense of this case was conducted by the Department of Justice. In the District Court appellant's motion for directed verdict was based in part on the ground that "the press release was qualifiedly privileged." The suit in last analysis, I take it, may be viewed as one against the Government which undoubtedly through Congress will be asked to respond to the judgment. I doubt that Government attorneys possess the power to waive a defense which, if it had been asserted, might have prevailed here. Compare our opinion in No. 13245—*Newbury* v. *Love*, decided February 28, 1957, where we found absolute privilege, despite *Colpoys* v. *Gates*.[5]

I see no obstacle in the *Colpoys* case to the result which I believe is required here. The limited functions of a marshal in publishing a statement in connection with the resignation of two deputies are not to be confounded with a situation such as the instant case presents. Even in *Colpoys* we recognized that officers with policy-determining functions are in a different category, and privilege is shown to have been accorded to acts in the general line of duty.

To recapitulate: here the Acting Director's status and authority stemmed from the President himself. His Executive Order made this agency head, in his own division, a policymaker second only to the Economic Stabilization Director. Involved, as a matter of top interest, was a policy position with reference to a plan admittedly devised to "use up" $2,600,000

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[4] Cf. *Dickens* v. *International Brotherhood, Etc.*, 84 U.S. App. D.C. 51, 171 F. 2d 21 (D.C. Cir. 1948).

[5] 73 App. D.C. 193, 118 F. 2d 16 (D.C. Cir. 1941).

of public funds which had been earmarked for terminal leave. If the appellant thought the Madigan plan had been a perversion of an appropriation to ends beyond the intention of Congress in providing the funds, it was his duty to speak out. He was not alone in his appraisal of the untoward result. His press release did no more than seek to allay the serious challenge to the integrity of the agency and to attempt to restore a public confidence which the use of the plan had impaired. The subject matter was personal to him because his name had without authorization been affixed to an official letter which misrepresented his position. The whole congeries of occurrences, including the position the Acting Director intended to take with reference to the problem, became of vital concern to the public. Under such circumstances, the press release was entitled to the status of privilege.

We need not, indeed I do not seek to, relax the rule which regards a cabinet officer as "absolutely privileged to publish defamation, not only in doing his duty but also in discussing it; his defamation, to be protected, need only have 'more or less connection with the general matters committed by law to his control or supervision,'"[6] I think we should hold only that this officer, on the facts here disclosed, acting in the name of the President and exercising, by redelegation, powers conferred upon him by statute, and possessed of policy-making functions, is immune on account of a policy statement issued within the scope of his authority as to a matter committed by law to his control.

In this view, I think the judgment should be reversed.

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[6] *Colpoys* v. *Gates*, *supra note* 5, 73 App. D.C. at 194, 118 F. 2d at 17, citing *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896).

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1957. *C. A. 3221-53*

No. 13217

WILLIAM G. BARR, APPELLANT

v.

LINDA A. MATTEO, APPELLEE

April Term, 1957. *C. A. 3221-53*

No. 13218

WILLIAM G. BARR, APPELLANT

v.

JOHN J. MADIGAN, APPELLEE

Appeals from the United States District Court for the District of Columbia

Before EDGERTON, *Chief Judge,* and FAHY and DANAHER, *Circuit Judges*

JUDGMENT

These appeals came on to be heard on the record from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the order of the said District Court appealed from in these cases be, and it is hereby, affirmed.

It is further ORDERED by the Court that each party in these cases shall bear his own costs on these appeals.

Dated: May 2, 1957.

Per Chief Judge EDGERTON.

Separate dissenting opinion by Circuit Judge DANAHER.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1957

No. 13217

WILLIAM G. BARR, APPELLANT

v.

LINDA A. MATTEO, APPELLEE

No. 13218

WILLIAM G. BARR, APPELLANT

v.

JOHN J. MADIGAN, APPELLEE

Before EDGERTON, *Chief Judge*, and FAHY, in Chambers

ORDER

It is ORDERED by the Court that the opinion of this Court in the above cases be modified by striking the following words beginning on the fifteenth line of the third page:

"We held in that case"

and by inserting in lieu thereof the following words:

"We do not suggest that this principle is limited to Cabinet officers. We have no present occasion to consider whether it would apply, *e.g.*, to the Director of Economic Stabilization, who was appellant's official superior, or to the Chairman of the Atomic Energy Commission, or to other officers whose positions are comparable to those of Cabinet officers. Appellant's position was not of that sort. We held in *Colpoys*"

Per Curiam.

Dated: June 6, 1957.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1957

No. 13217

WILLIAM G. BARR, APPELLANT

v.

LINDA A. MATTEO, APPELLEE

No. 13218

WILLIAM G. BARR, APPELLANT

v.

JOHN J. MADIGAN, APPELLEE

Before EDGERTON, *Chief Judge,* PRETTYMAN, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN and BURGER, *Circuit Judges,* in Chambers

ORDER

Upon consideration of appellant's petition for a rehearing en banc, it is

ORDERED by the Court that the aforesaid petition be, and it is hereby, denied.

Per Curiam.

Dated: June 6, 1957.

Circuit Judges WASHINGTON, BASTIAN, and BURGER did not participate in the foregoing order.

Circuit Judge MILLER would grant the petition.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13217

WILLIAM G. BARR, APPELLANT,

v.

LINDA A. MATTEO, APPELLEE

No. 13218

WILLIAM G. BARR, APPELLANT,

v.

JOHN J. MADIGAN, APPELLEE

On Reargument Pursuant to Remand by the Supreme Court of the United States

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Decided June 12, 1958

Mr. Paul A. Sweeey, Attorney, Department of Justice, with whom *Assistant Attorney General Doub*, *Messrs. Oliver Gasch*, United States Attorney, and *Joseph Langbart*, Attorney, Department of Justice, were on the brief, for appellant.

Mr. Byron N. Scott, with whom *Mr. Richard A. Mehler* was on the brief, for appellees.

Before EDGERTON, *Chief Judge*, and FAHY and DANAHER, *Circuit Judges*.

PER CURIAM: The case is before us a second time. In our earlier decision, *Barr* v. *Matteo*, 100 U.S. App. D.C. 319, 244 F. 2d 767, where the facts are set forth more fully, we held that appellant, defendant in the District Court, could not successfully defend the libel suit of appellees, plaintiffs, on the basis of an absolute privilege. For reasons stated by the majority we did not pass upon the District Court's rejection of appellant's claim of a qualified privilege. The Supreme Court granted certiorari and remanded the case to us "with directions to pass upon petitioner's claim of a qualified privilege." *Barr* v. *Matteo*, 355 U.S. 171, 173. On this remand the case has been briefed and argued again.

A qualified privilege exists "when a communication relates to a matter of interest to one or both of the parties to the communication and when the means of publication adopted are reasonably adapted to the protection of that interest." *Blake* v. *Trainer*, 79 U.S. App. D.C. 360, 362, 148 F. 2d 10, 12. We now hold that appellant had a qualified privilege as Acting Director of the Office of Rent Stabilization to publish a defense of his conduct and that of his organization.

Several questions remain. One is whether appellant stayed within his qualified privilege or lost it by excessiveness of publication of the press release in suit. As to this we think that in view of the widespread public nature of the criticism of the Agency the scope of dissemination of the press release was not excessive. Another question is whether the qualified privilege which otherwise existed did not apply because the press release was aimed at appellees rather than at the source of the criticism of the Agency, which was in the Congress of the United States. We think that appellees were so connected with the subject matter of the press release that reference to them did not destroy the privilege. This situation is different from those cited

by appellees where the defendants seem to have gone out of their way to libel the plaintiffs.[1] See *Etchison* v. *Pergerson*, 88 Ga. 620, 15 S.E. 680.

This brings us to the questions whether appellant lost the privilege (1) by reason of malice or (2) lack of reasonable ground to believe that the content of his publication was true; or both. These are jury questions, as to which we hold there was sufficient evidence to go to the jury. Since they were not submitted to the jury our reversal will be accompanied by a remand for further proceedings not inconsistent with this opinion.

It is so ordered.

[1] *Merchants' Ins. Co.* v. *Buckner*, 98 Fed. 222, 232 (6th Cir.); *Williams* v. *McManus*, 38 La. Ann. 161, 58 Am. Rep. 171.

Filed June 12, 1958. Joseph W. Stewart

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1958

C. A. 3221-53

No. 13217

WILLIAM G. BARR, APPELLANT,

v.

LINDA A. MATTEO, APPELLEE

April Term, 1958

C. A. 3221-53

No. 13218

WILLIAM G. BARR, APPELLANT,

v.

JOHN J. MADIGAN, APPELLEE

On Reargument Pursuant to Remand by the Supreme Court of the United States

Before: EDGERTON, *Chief Judge,* and FAHY and DANAHER, *Circuit Judges*

JUDGMENT

Pursuant to the judgment of the Supreme Court of the United States dated December 9, 1957, these cases came on for reargument on the record from the United States District Court for the District of Columbia, and were reargued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgments of the said District Court appealed from in these cases be, and they are hereby, reversed, and that these cases be, and they are hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court:

It is further ORDERED by the Court that each party in these cases shall bear its own costs on these appeals.

Dated: JUNE 12, 1958.

PER CURIAM.
(S.) C. F.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 350

WILLIAM G. BARR, *Petitioner*,

v.

LINDA A. MATTEO and JOHN J. MADIGAN

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BYRON N. SCOTT
RICHARD A. MEHLER
Counsel for Respondents

September, 1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 350

WILLIAM G. BARR, *Petitioner*

v.

LINDA A. MATTEO and JOHN J. MADIGAN

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondents Linda A. Matteo and John J. Madigan, by and through their counsel, Byron N. Scott and Richard A. Mehler, oppose the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit as petitioned for by the Solicitor General on behalf of William G. Barr.

QUESTION PRESENTED

Should the Courts accord absolute immunity to suit for libel to Acting Directors of subordinate branches of Government agencies who broadcast to the newspapers false, defamatory statements of reasons for intending to suspend agency employees as soon as anticipated positions give them the power to do so?

STATEMENT

This "Opposition", for the purpose of the argument, adopts the "Statement" in the Petition, but with the following corrections:

The Office of Rent Stabilization was a branch of, and its Director was subordinate to the Administrator of, the Economic Stabilization Agency (Petitioner's Appendix, pp. 15, 21). The Press Release which is the subject matter of this suit made no reference to the "then-current Congressional inquiry" (Petition, pp. 2, 5-6). The "terminal leave plan" was "devised" by respondent Madigan who asked for and received from respondent Matteo an opinion on the advantages and disadvantages of the proposed "plan" to employees of the Office who would have been affected by it (Petitioner's Appendix, p. 20). The "plan" was "devised" as a method of keeping the agency together while Congress decided whether rent control would be extended for an additional period of time. One feature of the plan involved the use of the funds "earmarked" for terminal or accumulated annual leave payments. Employees affected by the "plan" were to be converted to reinstatement to the extent possible and necessary under the new Act, if the Act were extended, and when the appropriation had been made by Congress for its operation (R. 14-15, 17). The Thomas Amendment did not apply to the Office of Rent Stabilization when the personnel actions were taken (Sec. 1212, General Appropriations Act, 1951, 64 Stat. 768). The personnel actions were taken prior to the approval of the Act but became effective on the Monday following the Friday approval of the Act. The June 23, 1950 Act did not extend rent control to June 30, 1951 but only to December 31, 1950 (Housing and Rent Act of

1950, 64 Stat. 255). Respondent Madigan's letter to Senator Williams contained nothing that could be interpreted as a defense of the "plan". A copy of Madigan's letter to Senator Williams was read by petitioner in the early afternoon of February 3, 1950, prior to the Senator's speech on the afternoon of February 4. The District Court "refused to give instructions on the defense of truth" on the ground that defendant had offered no evidence of the truth of the defamatory publication. The Court of Appeals did not "declare" that the principle of absolute privilege "might include other officers who held comparable positions"; what they said was, "We have no present occasion to consider" that question (Petitioner's Appendix, p. 24). Petitioner was Acting Director of a subordinate branch of the Economic Stabilization Agency. His delegation of power was from the Administrator of that agency, not from the President. His functions were administrative; not "policy-making" (Petitioner's Appendix, p. 19).

REASONS FOR REFUSING THE WRIT

1. "The first decision of the Court of Appeals in this case" was vacated by this Court, 355 U.S. 171, 173. Quaere: Does the question of absolute immunity arise on the record?

2. The "Holding of the Court of Appeals" is not a "departure from the consistent pattern" set by the cases cited by Petitioner in footnote 5 on page 12 of the Petition. In those cases absolute immunity was accorded subordinate officials whose defamatory publications were contained in official reports made by them to their superiors and made within the scope of their official employment. That is not the case here. Peti-

tioner made no official report to his superior officer which could have brought such a publication within the "pattern" of those decisions but issued a press release to the newspapers as in *Colpoys* v. *Gates,* 118 F. 2d 16 (C.A.D.C.).

3. The holding does not conflict with the principles of this Court's decision in *Spalding* v. *Vilas,* 161 U.S. 483. That decision was and should remain limited by the facts to a member of the President's Cabinet. Whether or not a Cabinet member should be absolutely free from liability for malicious libel of an employee or any other person in his official capacity, it would be an "unwholesome" thing to extend this absolute immunity to such subordinate officers as Petitioner, *Howard* v. *Lyons,* 250 F. 2d 171, Cert. granted this term.

4. It seems to respondents that there is no confusion in the law on the subject. It seems clear that members of the cabinet, in their official capacities, may talk about anyone without having to answer for their motives but that lesser officials must confine their official remarks about others to their official reports to superiors or answer to the defamed for their motives.

5. It also seems to respondents that the Courts should go no further than they have already gone, *Howard* v. *Lyons, supra; Murray* v. *Brancato,* 290 N.Y. 52, 48 N.E. 2d 257; and see the concurring opinion of Chief Judge Groner in *Glass* v. *Ickes,* 73 App. D.C. 3, 117 F. 2d 273, cert. den. 311 U.S. 718. It seems absurd to say that "policy-making" officials below Cabinet rank will be hampered seriously in public discussion of the affairs of Government unless they are free to libel their employees maliciously without hav-

ing to answer for their motives. No sufficient public interest requires that such an officer be so protected. It is a dangerous thesis and "altogether subversive of the fundamental principle that no man in this country is so high that he is above the law" (Chief Judge Groner in *Glass* v. *Ickes, supra*).

6. The basic issue in the instant case is not the same as the basic issue in *Howard* v. *Lyons, supra,* in which this Court granted Certiorari this Term. In *Howard* the defendant issued no press release. He sent copies of his official report to his superior, to a select few, the Massachusetts Congressman. The basic difference between *Howard* and the instant case is the difference between 14 officially interested and informed elected officials and 130,000,000 of the uninformed general public with no sanctions to provide adequate deterrent. A reversal in *Howard* would not dispose of the instant case.

7. If, as he should have done, petitioner had suspended respondents and reported his reasons to his immediate superior, to whom the respondents could and did appeal, the case would have fallen within the pattern set by the cases cited in footnote 5 on page 12 of the petition. This would have been his duty, the customary operation. He should have done nothing else.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

BYRON N. SCOTT
RICHARD A. MEHLER
Counsel for Respondents

September, 1958

No. 350

In the Supreme Court of the United States

OCTOBER TERM, 1958

WILLIAM G. BARR, PETITIONER

v.

LINDA A. MATTEO AND JOHN J. MADIGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

J. LEE RANKIN,
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No. 350

WILLIAM G. BARR, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The United States District Court for the District of Columbia wrote no opinion. The original opinion of the Court of Appeals for the District of Columbia Circuit, dated May 2, 1957, as modified by its order of June 6, 1957 (R. 43–51), is reported at 244 F. 2d 767. The *per curiam* opinion of this Court, dated December 9, 1957, vacating the judgment of the Court of Appeals and remanding the case to that court for further consideration, is reported at 355 U.S. 171. The opinion of the Court of Appeals upon remand (R. 53–54) is reported at 256 F. 2d 890.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1958 (R. 55–56). The petition for a writ of certiorari was filed on September 9, 1958, and was granted on December 15, 1958 (R. 56). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the absolute immunity from defamation suits, accorded officials of the Government with respect to acts done within the scope of their official authority, extends to statements to the press by high policy-making officers, below cabinet or comparable rank, concerning matters committed by law to their control or supervision.

STATEMENT

This is a libel suit instituted by respondents, former employees of the Office of Rent Stabilization, against petitioner, who was the Acting Director of that Office, based on matters contained in an official press release issued by the latter on February 5, 1953. The press release related to a contemporaneous congressional inquiry concerning a terminal-leave plan which had been devised by the respondents in 1950 for employees of the agency. The factual background of the case may be summarized as follows:

1. *The terminal-leave plan.* In May 1950, reduction-in-force notices were issued to personnel of the Office of Housing Expediter, an independent executive agency and the predecessor of the Office of Rent Stabilization. This was occasioned by the fact that

he agency's statutory existence was about to expire. Respondent Madigan, who was Deputy Director in harge of personnel and fiscal matters, and respondnt Matteo, chief of the personnel branch, devised a lan which was designed to utilize $2,600,000 (which ad been earmarked in the agency's appropriation for he fiscal year 1950 exclusively for terminal-leave payments) as a means of conserving funds for future perational needs should the agency's life be extended R. 14, 17). The idea was to pay off accumulated erminal leave, thus obviating the possibility that the gency might have to meet a heavy terminal-leave urden the next fiscal year, out of the agency's general funds. The plan provided that employees of the gency would be discharged pursuant to the existing eduction-in-force notices, receive payment for accrued annual leave out of the earmarked terminaleave appropriations, be rehired the following day as emporary employees, and then be restored to permaent status if the life of the agency were thereafter xtended (*ibid.*).

Petitioner, who was then General Manager of the ffice of Housing Expediter, was opposed to the plan n the ground that it violated the spirit of the soalled Thomas Amendment to the General Appropriaon Act, 1951, 64 Stat. 768, which required governent employees to use their annual leave within a pecified time and prohibited payments for unused nnual leave accumulated during the calendar year 950 (R. 15). The Housing Expediter decided gainst general adoption of the plan. However, when rs. Matteo advised him that some of the employees

desired to take advantage of the proposal, he decided that it might be utilized on a volunteer basis (R. 17–18, 19). On June 23, 1950, Congress extended the authority of the Office of Housing Expediter to June 30, 1951, and two days later the terminal-leave plan was put into effect for forty-nine employees of the agency, including the respondents (R. 14, 18, 21).[1]

2. *The press release.* On January 28, 1953, Senator John J. Williams of Delaware wrote to the Office of Rent Stabilization (successor to the Office of Housing Expediter) inquiring as to the 1950 terminal-leave payments (R. 19–20). The letter came to the attention of respondent Madigan, who drafted a reply defending the plan (R. 20). The draft was not brought to the attention of petitioner, who was at that time the Acting Director of the agency (R. 15, 20). The letter was subsequently prepared in final form and sent to petitioner's office for signature. In petitioner's absence, his name was signed by the Director's secretary, and the letter was delivered to Senator Williams on the morning of February 3 (*ibid.*).

The following day (February 4), Senator Williams, on the floor of the Senate, delivered a speech criticizing the 1950 terminal-leave payments and requesting that the matter be investigated by a congressional committee (R. 3, 16). Senators Ferguson, Dirksen, and McCarthy joined in a denunciation of the leave

[1] Respondent Madigan has since sued in the Court of Claims to recover the amount of terminal-leave payments due him under the plan. The Court of Claims recently held that the plan was not in violation of law. *Madigan* v. *United States*, No. 262–53, June 4, 1958.

payments as a "conspiracy to defraud the Government" and a "raid on the Treasury." 99 Cong. Rec. 868–71. These comments received wide publicity (R. 3, 4) and petitioner was questioned about the plan by newspapers and other interested parties (R. 16).

On February 5, petitioner advised the respondents that because of the criticism of himself and the Office of Rent Stabilization, the adverse publicity, and the need to protect himself and safeguard the interests of the agency, he was going to take disciplinary action (R. 16, 20, 22). He thereupon served them with letters expressing his intention to suspend them on February 9, the date when his appointment as Acting Director was to become effective.[2] Contemporaneously, at petitioner's direction, the Office of Rent Stabilization issued the following press release, which is the subject matter of this litigation (R. 4–6):

> William G. Barr, Acting Director of Rent Stabilization, today served notice of suspension on the two officials of the agency who in June 1950 were responsible for the plan which allowed 53 of the agency's 2,681 employees to take their accumulated annual leave in cash.
>
> Mr. Barr's appointment as Acting Director becomes effective Monday, February 9, 1953, and the suspension of these employees will be his first act of duty. The employees are John

[2] Petitioner had been appointed Acting Director effective February 9, 1953, when the resignation of Director James Henderson was to become effective. When the press release was issued, petitioner was Acting Director by designation of Mr. Henderson, who was then absent from Washington (R. 24).

J. Madigan, Deputy Director for Administration, and Linda Matteo, Director of Personnel.

"In June 1950," Mr. Barr stated, "my position in the agency was not one of authority which would have permitted me to stop the action. Furthermore, I did not know about it until it was almost completed.

"When I did learn that certain employees were receiving cash annual leave settlements and being returned to agency employment on a temporary basis, I specifically notified the employees under my supervision that if they applied for such cash settlements I would demand their resignations and the record will show that my immediate employees complied with my request.

"While I was advised that the action was legal, I took the position that it violated the spirit of the Thomas Amendment and I violently opposed it. Monday, February 9th, when my appointment as Acting Director becomes effective, will be the first time my position in the agency has permitted me to take any action on this matter, and the suspension of these employees will be the first official act I shall take."

Mr. Barr also revealed that he has written to Senator Joseph McCarthy, Chairman of the Committee on Government Operations, and to Representative John Phillips, Chairman of the House Subcommittee on Independent Offices Appropriations, requesting an opportunity to be heard on the entire matter.

The proceedings below. Shortly after the issu- of the press release early in February 1953, this was brought, charging that the release was a cious libel causing damage to respondents (R. 1-

6). Petitioner's motion to dismiss the complaint on the ground of absolute privilege was overruled by the District Court on the authority of *Colpoys* v. *Gates*, 118 F. 2d 16 (C.A.D.C.) (R. 7). Petitioner then filed an answer (R. 7–9, 12), and a jury trial was held. After respondents had submitted evidence in support of their claim of liability, petitioner moved for a directed verdict on the grounds of (1) truth, (2) no defamatory imputation, and (3) qualified privilege. This motion was denied. The District Court also denied a motion for a directed verdict on the ground of absolute privilege. It refused to give instructions on the defense of truth and qualified privilege (R. 40) and instructed the jury to return a verdict for respondents if it found that petitioner's statements were defamatory (R. 40–41). A verdict was returned in favor of respondents in the amounts of $6,500 and $2,000, respectively.

On appeal to the Court of Appeals for the District of Columbia Circuit, the sole issue then raised by petitioner was whether the issuance of the press release was absolutely privileged (R. 45). At the request of the Court of Appeals, following argument, each party filed a memorandum on the question whether the court could nevertheless consider the issue of qualified privilege. Petitioner urged that the question could be considered by the court under its Rule 17 (i), which provides that "the court, at its option, may notice and pass upon a plain error not pointed out or relied upon." The court concluded, however, that since the waiver was "informed and deliberate," the rule in-

voked on petitioner's behalf was not applicable and the decision would be confined to the issue of absolute privilege (R. 45–46).

On the merits, the court (Judge Danaher dissenting) affirmed the judgment against petitioner. The majority opinion (by Chief Judge Edgerton, with Judge Fahy concurring) recognized that petitioner's decision to suspend respondents "probably [was] within his general line of duty," but held that petitioner "in explaining his decision to the general public * * * went entirely outside his line of duty" (R. 44). The majority stated that "if the defendant had been a Cabinet officer, his public explanation might have been absolutely privileged" (*ibid.*), but that in this respect the position of the Acting Director of the Office of Rent Stabilization was not different from that of the United States Marshal involved in *Colpoys* v. *Gates,* 118 F. 2d 16 (C.A.D.C.). The majority subsequently modified its opinion to declare that absolute privilege was not necessarily limited to cabinet officers but might also protect other officers who held comparable positions (R. 51).

Judge Danaher, in dissenting (R. 46–49), stressed the fact that petitioner, as Acting Director of the Office of Rent Stabilization, had been delegated all of the powers, duties, and functions conferred on the President by Title II of the Housing and Rent Act of 1947, 61 Stat. 193. In his view, the press release was no more than a declaration of policy by a policy-making executive with respect to a matter committed by law to his control or supervision.

Petitioner thereafter applied to this Court for a writ of certiorari, raising the question whether the press release was protected by an absolute privilege (No. 409, 1957 Term). The Court granted the petition, vacated the judgment of the Court of Appeals, and remanded the case to that court "with directions to pass upon petitioner's claim of a qualified privilege." 355 U.S. 171, 173. The Court ruled that the question of absolute privilege should not have been reached by the Court of Appeals without first considering the narrower defense of qualified privilege, which might have been adequate to a disposition of the case.

On remand, the Court of Appeals held that petitioner's statements were protected by a qualified privilege and that the privilege was not lost by an excessive publication or by a specific reference in the press release to the respondents (R. 54). However, it further held that there was sufficient evidence in the record to warrant submitting to the jury the question whether the privilege had been forfeited by reason of (1) malice or (2) lack of reasonable grounds for believing that the contents of the publication were true. Since the District Court's approach had made it unnecessary to submit these issues to the jury, the case was reversed and remanded for further proceedings (*ibid.*).

SUMMARY OF ARGUMENT

1. This case involves the same basic question as is presented in *Howard* v. *Lyons*, No. 57, this Term. For the reasons elaborated in the Government's brief in *Howard*, we submit that the court below errone-

ously failed to accord an absolute privilege to the press release issued by the petitioner here. In both cases, we urge this Court to hold that the petitioners are immune from defamation liability for statements made in the course of performing their official duties, provided only that those statements are germane to matters committed by law to their control or supervision.

2. In our view, the issuance of the press release in question was clearly an act within the scope of petitioner's authority and responsibility as the head of an important agency of the Government. Petitioner had the primary responsibility for that agency's policies and activities, and control over its internal management and several thousand employees. The press release related solely to an official matter which had received a great amount of prior publicity tending to impair public confidence in the agency and its high officials. Dissemination of information to the public concerning such a matter must certainly be deemed within the area of petitioner's responsibilities:—democratic government depends on the public's knowledge of governmental policies and the conduct of public officeholders. If this need is to be adequately met, those occupying high executive posts in Government must be free of the threat of personal liability typified by the libel suit in this case.

ARGUMENT

Petitioner Is Immune From Defamation Suits Predicated on Statements Which He Made in the Course of His Official Duties While Head of a Federal Agency

This case presents for decision the same basic issue as is involved in *Howard* v. *Lyons*, No. 57, pending

on reargument:—whether government officials below cabinet level are immune from defamation liability for statements which are made in the course of performing their official functions and which relate to matters committed by law to their control or supervision. In *Howard,* the Court of Appeals for the First Circuit held that an executive officer below cabinet rank did not have full immunity when he sent interested Congressmen copies of an official report addressed to his superior officers, despite the fact that he was performing his official duty in making the report available. In the present case, the Court of Appeals for the District of Columbia Circuit has held that the issuance of an official press release by the head of an independent executive agency was not absolutely privileged despite the fact that it was germane to an official subject matter and was made by an official who had general authority to issue press releases concerning the business of the agency. Both cases, therefore, require a high government officer to do precisely what the rule of absolute immunity is designed to avoid, *i.e.,* litigate in a trial before a jury (1) the propriety of action taken by the officer in the course of executing his duties and (2) the *bona fides* of his motivation.

In our brief in *Howard,* to which the Court is respectfully referred, we develop at length the considerations which support the view that executive officers must be fully protected from tort liability for statements made in the course of their official duties if the public interest in the proper performance of those duties is to receive adequate protection. We also point out that this principle underlies the consistent

pattern of decisions of the lower federal courts, which has developed over a long period of time on the basis of this Court's decision in *Spalding* v. *Vilas,* 161 U.S. 483. We shall briefly summarize those arguments here and then show their applicability to the facts of the present case.

1. In *Spalding* v. *Vilas, supra,* this Court held that the Postmaster General was immune from liability in defamation for public statements "having more or less connection with the general matters committed by law to his control or supervision." 161 U.S. at 498. The immunity was deemed absolute—so long as making the statements was "not unauthorized by law" (161 U.S. at 493) or beyond the scope of official duties, the existence of malice was immaterial. The decision also makes plain that in order to receive the protection of immunity, it is not necessary that the official be under a positive legal duty to act; it is sufficient that general legal authority for the act existed. 161 U.S. at 498–99. See also *Glass* v. *Ickes,* 117 F. 2d 273 (C.A.D.C.), certiorari denied, 311 U.S. 718; *Mellon* v. *Brewer,* 18 F. 2d 168 (C.A.D.C.), certeriorari denied, 275 U.S. 530.

So far as official communications are concerned, the doctrine of *Spalding* v. *Vilas* has not been limited to heads of executive departments but has been applied to government officials of lesser rank. Thus, in *De Arnaud* v. *Ainsworth,* 24 App. D.C. 167, appeal dismissed, 199 U.S. 616, the Court of Appeals for the District of Columbia Circuit held that the making of an official report by an officer in the War Department to the Secretary of War must be absolutely

privileged in order to avoid serious restraint on "the perfect freedom which ought to exist in discharge of public duty * * *." 24 App. D.C. at 178. And the court followed this decision in *Farr* v. *Valentine*, 38 App. D.C. 413, holding that a communication to the Secretary of the Interior by the Commissioner of Indian Affairs charging the plaintiff with professional incompetency was absolutely privileged. Numerous other decision of various federal courts have reached the same result.[3] The unanimity in treatment is striking.

Nor has the doctrine of absolute immunity been limited to defamation suits. In *Yaselli* v. *Goff*, 275 U.S. 503, this Court, in a memorandum opinion, affirmed a decision of the Court of Appeals for the Second Circuit (12 F. 2d 396) holding that a Special Assistant to the Attorney General "in the performance of the duties imposed upon him by law, is [absolutely] immune from a civil action for malicious prosecutions * * *." (12 F. 2d at 406.) The Court of Appeals ruled (*ibid.*) that "the public interest requires that persons occupying such important positions and so closely identified with judicial departments of the government should speak and act freely and fearlessly in the discharge of their important official functions."

This case was followed by the Second Circuit in *Gregoire* v. *Biddle*, 177 F. 2d 579, certiorari denied, 339 U.S. 949, in a noted opinion by Judge Learned Hand. The court there held that officers of the Department of Justice (including both the Attorney Gen-

[3] See the cases cited in our brief in No. 57, p. 20, fn. 8.

eral and lesser officials), irrespective of motives, could not be held personally liable for the wrongful internment of the plaintiff under the Alien Enemy Act of 1798. And in the similar case of *Cooper* v. *O'Connor*, 99 F. 2d 135, certiorari denied, 305 U.S. 643, the Court of Appeals for the District of Columbia Circuit held officials of the Treasury and Justice Departments absolutely immune from liability for malicious prosecution. Further case authority in areas outside of defamation is considerable and uniform in support of the principle of absolute privilege.[4]

If the purpose of the rule of immunity is to be effectuated, the immunity must be absolute, and not merely qualified or conditional, so as to avoid the necessity of litigating such difficult questions of fact as proper motivation and reasonableness of conduct. The policy underlying the rule is not that a federal officer, by virtue of his position, should have a privilege to defame or to act maliciously, but that a greater public interest requires that the officer, in the discharge of his duties, be uninhibited by the fear of an onerous lawsuit or of substantial personal liability. To attain these ends, an absolute immunity is necessary. A qualified privilege is forfeited by the use of "excessive" language, by an "excessive" publication, by an "improper" motive, or by the absence of a reasonable belief in the truth of the statements made. These are matters for a jury determination and obviously cannot be easily measured. The purpose of the rule of absolute immunity, then, is to forestall litigation at the outset—to avoid the oppressive burdens

[4] See the cases cited in our brief in No. 57, p. 23, fn. 9.

which might be brought to bear upon vigorous public officials if their every controversial act and statement, made in the course of duty, bearing on the conduct of other persons, were to become a potential source of protracted and costly litigation against them personally.

It is also important that the nature of the duty being performed, and not the level of the officer's position, should determine the extent of the privilege. Given the present complexity of governmental operations, the head of an executive department cannot personally perform all of the functions of the department; he must act through subordinates. Obviously, many high-ranking, albeit subordinate, officials are performing policy-making functions which involve judgment and discretion. In exercising that judgment, it is often required that statements be made to other officers in the department, to executive officials outside the department, to members of other branches of the Government, and, on occasion, to the press and the general public. The policy underlying the rule of absolute immunity is that these duties should be performed freely and vigorously; the rule's rationale is the public interest in the function being performed, not a desire to bestow the splendors of unnecessary privilege upon men of rank.

2. In the *Howard* case, the First Circuit held that the officer's communication was not absolutely privileged despite the fact that it was made "in the course of the performance of his executive functions * * *." 250 F. 2d 912, 915. Moreover, uncontradicted affidavits established that Admiral Howard's communi-

cation not only was an act within the general scope of his authority but constituted the performance of a specific duty. In the present case, the Court of Appeals held that in issuing the press release petitioner had gone "entirely outside his line of duty" (R. 44). Perhaps, in literal terms, therefore, the court here, unlike the court in *Howard,* adhered to the general principle that authorized acts are absolutely privileged. But it did so only by adopting an artificially restrictive test of "line of duty," one which fails to take into account the nature of the officer's functions and the circumstances necessitating and justifying his action—a test which is nothing more than one way of stating the court's conclusion that an absolute privilege ought not to be accorded. Because of this, we believe that the case at bar and the *Howard* case are not to be distinguished in any decisive respect; both decisions seriously jeopardize the public interest in proper and vigorous performance of executive duties.

In *Spalding* v. *Vilas, supra,* this Court held that in order to receive the protection of immunity, it was not necessary that the official be under a positive legal duty to act, but it was sufficient that general legal authority for the act existed. Similarly, the Court of Appeals for the District of Columbia Circuit, in *Mellon* v. *Brewer,* 18 F. 2d 168, certiorari denied, 275 U.S. 530, held that the release to newspapers of an official letter from the Secretary of the Treasury to the President was absolutely privileged although the President had not requested the report, for "it certainly was not beyond the scope of the Secretary's

duty and authority to submit one." 18 F. 2d at 171. And in *Cooper* v. *O'Connor*, 99 F. 2d 135 (C.A.D.C.), certiorari denied, 305 U.S. 643, the court ruled that in order for an act to be within the scope of official duties it was not necessary that it be prescribed by statute or specifically directed or requested by a superior officer.

Judged by these standards, it seems indisputable that petitioner was acting within the scope of the authority of his office in giving full publicity to his agency's position on the terminal-leave plan and to the disciplinary action which he proposed to take. Petitioner, as Director of the Office of Rent Stabilization, was the head of a constituent agency of the Economic Stabilization Administration and was acting pursuant to a very broad delegation of presidential authority. His agency supervised and enforced federal rent control, and responsibility for proper performance of this important governmental function rested squarely with him. All powers, duties, and functions conferred on the President by Title II of the Housing and Rent Act of 1947 (61 Stat. 193) were redelegated to the Director of the Office of Rent Stabilization by the Economic Stabilization Administrator, and "[t]he aforementioned delegation of authority [reflected] the Administrator's policy to delegate to constituent agencies operating authority to the fullest practicable extent consistent with his ultimate responsibility for the conduct of the Agency's activities in a reasonable and efficient manner." 16 Fed. Reg. 7630. Petitioner thus had full responsibility for the internal management of the

agency, with its several thousand employees, and, like all heads of executive departments and agencies, was answerable to the President and Congress for the administration of the agency's policies.

The issuance of press releases was a regular practice of the Office of Rent Stabilization.[5] The circumstances which prompted the issuance of the press release, as outlined *supra* (pp. 2–5), make it clear that it was an official act. Indeed, public explanation of his actions should be considered as much a part of petitioner's duties as the taking of the action itself. Given the circumstances, the prior publicity, and the congressional reaction, petitioner was fully justified in considering it to be an obligation of his office to explain the controversy and to keep the public fully informed of continuing developments. Specifically, as a result of the proceedings in Congress and the publicity adverse both to the Office of Rent Stabilization and to its high officials, petitioner properly concluded that the public was entitled to know where he, as acting head of the agency, stood on the matter and what corrective action he was planning to take.

The situation facing petitioner in the present case was similar to that facing the Secretary of the Treasury in *Mellon* v. *Brewer, supra,* where a press release issued by the Secretary, in order to offset

[5] See, *e.g.*, N.Y. Times, Jan. 8, 1949, p. 7, col. 1; Apr. 1, 1949, p. 43, col. 7; Apr. 11, 1949, p. 26, col. 4; Aug. 18, 1949, p. 2, col. 8; Aug. 19, 1949, p. 1, col. 4; Jan. 17, 1950, p. 50, col. 3; Dec. 30, 1950, p. 16, col. 4; Mar. 14, 1951, p. 27, col. 2; Mar. 21, 1951, p. 36, col. 2; Jul. 21, 1952, p. 26, col. 1; Aug. 28, 1952, p. 26, col. 8; Sept. 30, 1952, p. 43, col. 1; Jan. 27, 1953, p. 28, col. 2; Mar. 16, 1953, p. 15, col. 3.

adverse publicity to his department and the impairment of public confidence, was held to be absolutely privileged. The only distinction between that case and the present one is that the former involved a cabinet officer and the case at bar involves an agency head who is not of cabinet rank. But whether or not the author of the alleged defamation is a cabinet officer should not be controlling; the rationale of the rule of absolute immunity applies equally to lesser officials, such as petitioner, who hold policy-making or "political" positions.[6] They, too, should be free—more than that, encouraged—to explain their acts and policies to the public and press without fear that they will be embroiled in litigation. The interest of the public in having access to the facts is at stake, for press releases and press conferences by subordinate government officials exercising policy-making functions have become an important and accepted means of communication. The decision below, if allowed to stand, will necessarily tend to curtail the dissemination of controversial information which the public is entitled to receive.

In recent years, Congress has given repeated emphasis to the public's "right to know." Legislative bills have included "a positive affirmation of Congress' intent that the people be enabled to know what is going on in their Government * * *." H. Rep. No. 1770, 85th Cong., 2d Sess. 23. The importance of a free flow of information to the public was recently expressed by a congressional committee in these terms (H. Rep. No. 1758, 85th Cong., 2d Sess. 17):

[6] See the brief for the petitioner in No. 57, pp. 31–33.

> "That the people must know" is a premise which is cemented into the foundations of any working democracy. James Monroe put the principle very well in his seventh annual message on the state of the Union:
>
> "To the people, every department of the Government and every individual in each are responsible, and the more full their information the better they can judge the wisdom of the policy pursued and the conduct of each in regard to it."

These statements do not unduly emphasize the importance of a public official's informing function and the vital public interest which the defense of absolute privilege serves to protect and which the denial of such a defense would seriously impair.

In summary, petitioner was a high policy-making official of the Government and the head of an important government agency. One of the clear responsibilities of his office was the dissemination of information to the public concerning that agency's policies and activities. The press release in question related entirely to an official subject matter—one which had received wide newspaper publicity and had occasioned considerable discussion on the floor of the Senate. The press release, whatever its impact on respondents, was nothing more than a statement of policy and proposed action with respect to a vital concern of the agency and its officials. Adequate protection of the public's interest in being apprised of the affairs of Government requires that officials shall not be required to run the gauntlet of constant and exhausting

personal litigation in order to follow a policy of disclosure.

CONCLUSION

For the reasons stated in this brief and in the petitioner's brief in No. 57, it is respectfully submitted that the judgment below should be reversed.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
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SAMUEL D. SLADE,
BERNARD CEDARBAUM,
Attorneys.

FEBRUARY 1959.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 350

WILLIAM G. BARR, *Petitioner*

v.

LINDA A. MATTEO AND JOHN J. MADIGAN

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS

BYRON N. SCOTT
RICHARD A. MEHLER
Attorneys for Respondents

Date: March 6, 1959

CITATIONS

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---

BRIEF FOR RESPONDENTS

Petitioner's thesis, if adopted by the Court, would place all Government officials who have it within their power to issue press releases, outside the law of libel (see Petitioner's Brief p. 14). No person's reputation would be safe from malicious attack by such officials. Petitioner was not, as he contends in his Brief, p. 11, the "head of an independent executive

agency." He was only a subordinate officer without policy making power, in a subordinate Office in an Agency in the Office of the President whose director was not a member of the Cabinet (Brief p. 6 and R. 43).

Nothing is more precious to man or woman than his or her good name—"it is the immediate jewel of their souls." The right to it is protected by natural as well as case law. Anything to the contrary is a court created exception to the rule, saving only the constitutional immunity given to Members of Congress for words spoken in debate in the Chambers. Heretofore, newly created exceptions have been limited, restrained and grudgingly yielded by the courts. Our Government has functioned and our citizens have been an enlightened people for over 150 years without the immunity now petitioned for by the Government for Petitioner and all others occupying comparable positions. Adoption of this thesis would open the flood gates. As the United States Court of Appeals for the District of Columbia Circuit said in its first opinion in *Barr* v. *Matteo and Madigan,* 244 F. 2d 767, "in explaining his decision to the general public, the defendant went entirely outside his line of duty. If such an officer were to do such a thing in bad faith or with a bad motive, no sufficient public interest would require that he be protected."

Petitioner advances the contention that the Deputy Director of the defunct Office of Rent Stabilization, a then subordinte branch of the Economic Stabilization Agency in the Office of the President (R. 43) could not have performed his official duties in administering rent control "fearlessly" and in a manner calculated to protect the public interest in the management of his office unless he could say in print whatever he chose

to say—impelled by whatever motive, malicious or otherwise—about anybody who might have any official contact with his office. Petitioner asks like immunity for like officials. To state the proposition in terms of the actual case before the Court should be to demonstrate its absurdity and its enormity.

The Courts have created some exceptions to the general rule that a man has a right to have his reputation respected by all and protected by the courts. They are said to have been grounded upon considerations of public policy—a curtailment of the rights of the individual for the greater good of all.

The Courts have made an exception in the cases of official reports of subordinates to their superiors, where it is the duty of the subordinate to report, about matters over which both exercise jurisdiction—as in the *Howard* case here and in *DeArnaud* v. *Ainsworth,* 24 App. D.C. 167, appeal dismissed, 199 U.S. 616, and like cases cited by petitioner. But, with a single exception, these cases have always been a reporting up—not out. That is not the case here. Petitioner made no report up—to a superior. He reported out—by issuing a press release to the general public.

The Courts have made an exception in the cases of judicial proceedings and of reports to law enforcing agencies of alleged malfeasances as in *Cooper* v. *O'Connor,* 99 F. 2d 135, certiorari denied, 305 U.S. 643 and like cases cited by petitioner. But that is not the case here.

The Courts have made an exception in the cases of erroneous or mistaken decisions of officials which cause damage as in *Gregoire* v. *Biddle,* 177 F. 2d 579, certiorari denied, 339 U.S. 949 and like cases cited by

petitioner. None of these cases grew out of a malicious and false press release such as the one which libelled respondents here.

Only in *Glass* v. *Ickes,* 117 F. 2d 273, 280, certiorari denied, 311 U.S. 718, has a Court "accorded" to a Government office absolute immunity from liability for defamation by a press release. Mr. Ickes was the Secretary of the Interior to which office the immunity was accorded. He reported "out" on an official action that had been taken by him in disbarring the plaintiff from practice before the Department. His press release was not an explanation of why he proposed to suspend an employee at some future date, as is the case here. In holding that:

> "to communicate information respecting the appellant's incapacity to the indefinitely large group of persons with rights subject to the Act, publication of an announcement in the press was proper, if not essential.

the Court said:

> "It may be that there are circumstances under which an official would exceed his prerogative in issuing a particular communication to the press."

And Chief Judge Groner concurring reluctantly declared:

> "* * * its cloak of absolute immunity offers such far-reaching opportunity for oppression, that it manifestly ought not to be extended beyond the impulse that gave it being. * * * I have felt some doubt about the correctness of the majority opinion. * * * I am impelled to concur in the opinion, though in doing so I express with great deference the fear that in this and previous cases we may have extended the rule beyond the reasons out of

> which it grew and thus unwittingly created a privilege so extensive as to be almost unlimited and altogether subversive of the fundamental principle that no man in this country is so high that he is above the law." (281-282).

Petitioner cites *Spalding* v. *Vilas*, 161 U.S. 483, as precedent for his plea for absolute immunity. He claims that this Court said in *Spalding* that the "Postmaster General was immune from liability in defamation for public statements" (p. 12). But this Court did not say that. The Postmaster General's publication was not a "public statement." Certain postmasters had certain claims against the Post Office Department under the law. The plaintiff represented many of them. As each claim was allowed, the Postmaster General, by letter, sent each claimant a warrant for the amount of his allowed claim together with a form letter or "circular" informing the claimant as to the law in his matter and a copy of the law on assignment of claims against the Government. The "publication" was directed privately to interested claimants only—there was no "public statement", discussion nor press release about the plaintiff in the *Spalding* case.

In that case, this Court said:

> "The thought that underlies the entire argument for the plaintiff is that the circular issued from the Post Office Department by direction of the Postmaster General was beyond the scope of any authority possessed by that officer; and therefore the sending of the circular *to the persons who had presented claims* against the Government was not justified by law, and would not protect the Postmaster General from responsibility for the injury done to the plaintiff from that act." (Emphasis added)

This Court asked:

> "If, as we hold to be the case, the *circular* issued by the Postmaster General *to claimants* under the Act of Congress in question was not unauthorized by law or beyond the scope of his official duties, can this action be maintained because of the allegation that what that officer did was done maliciously?" (Emphasis added)

And this Court answered:

> "Whatever difficulty may arise in applying these principles to particular cases, in which the rights of the citizen may have been materially impaired by the inconsiderate or wrongful action of the *head of a department*, it is clear—*and the present case requires nothing more to be determined*—that he cannot be held liable to a civil suit for damages on account of *official communications* made by him *pursuant to an Act of Congress*, and in respect of matters within his authority, by reason of any personal motive that might be alleged to have prompted his action for personal motives cannot be *imputed* to duly authorized official conduct. * * * In the present case, as we have found, the defendant, in issuing the circular in question, did not exceed his authority, nor pass the line of his duty as Postmaster General." (Emphasis added.)

There is nothing in the opinion to indicate that the ruling would have been the same had the Postmaster General issued a press release defaming the plaintiff instead of writing official letters to individual claimants who had a personal interest in receiving the information. In the instant case, the lower Court has said that a letter from defendant to his official superiors explaining his decision would have been within his general line of duty but that "in explaining

his decision to the general public, the defendant went entirely outside his line of duty."

Mellon v. *Brewer*, 18 F. 2d 168, certiorari denied, 275 U.S. 530 is cited by petitioner with the *Ickes* case (p. 12) and as authority (p. 16) for the "public statements" immunity. But the court in *Mellon* "presumed" that the Secretary's letter to the President had been released to the press with the President's approval after it had been received by the President. The *Mellon* case, even though Mr. Mellon was the Secretary of the Treasury, was just another *DeArnaud* v. *Ainsworth* case.

Of course, the only way to make a government officer on any level absolutely immune to suit, other than by Congressional legislation, is for the Court to "accord" the office absolute immunity (See Petitioner's Brief p. 14). It must apply to the officer's position—not to the occasion (Petitioner's Brief p. 15), if the officer is to be immune. Such immunity is not necessary for efficient government. Petitioner would have performed his duty "freely", "vigorously" and "fearlessly" by suspending the respondents and reporting to his superior officer his reasons for having done so. His superior officer could then have decided whether or not the occasion called for a libelous press release and taken the consequences whatever they might have turned out to be. Absolute immunity such as petitioned for here would be an open invitation to irresponsibility on the part of officers such as petitioner.

Petitioner states (p. 19-20) that "Congress has given repeated emphasis to the public's 'right to know.'" He says that a denial of absolute immunity to petitioner "would seriously impair" the "public official's informing function." If Congress wants officers on

petitioner's level to perform their "informing function" without risk of suit for libel when they inform falsely, Congress should grant that immunity.

In summary, petitioner was neither "a high policy-making official of the Government" nor the "head of an important Government Agency." The occasion and what had happened could not justify the granting of absolute immunity. Denial of the immunity will help to keep reckless Government officers within the law and the law above men in this country—as it should be. For the reasons stated, it is respectfully submitted that the order granting the writ should be vacated and the Petition denied.

BYRON N. SCOTT
RICHARD A. MEHLER

Attorneys for Respondents

Date: March 6, 1959

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 350

WILLIAM G. BARR, *Petitioner*,

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR REHEARING

BYRON N. SCOTT,
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IN THE

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OCTOBER TERM, 1958

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---

PETITION FOR REHEARING

A "Memorandum to the Heads of All Departments and Agencies" issued July 13, 1959, by the Attorney General (see Appendix) makes it evident that both parties in the instant case interpret the decision as meaning that the existence or non-existence of "absolute immunity" or "absolute privilege" depends upon the determination of a question of fact, *i.e.* are the defamatory statements "issued in the course of their official duties."

The Attorney General says that "No Government official should assume that these decisions (Barr and Howard) give him full and complete protection against actions for defamation." If that be true, there is no "immunity" and the "privilege" is not "absolute" but rests upon a question of fact. Under the decision an official who issues a defamatory statement is "immune" to suit only if he can prove that the statement was made "in the course of the exercise of the duties of the office." This presents a question of fact for a jury unless it is a question upon which reasonable men could not differ.

As the Attorney General says, "there may be a close question as to whether a statement is in the line of duty within the meaning of the decisions." The majority opinion of Mr. Justice Harlan states that "the question is a close one." It does not state affirmatively that the issuance of the press release was within the scope of Mr. Barr's official business but only negatively that "we cannot say" that it was not.

Mr. Justice Black's concurring opinion states: "There is some indication in the Record (without indicating it) that there was an affirmative duty on Mr. Barr to give press releases like this," but immediately recedes from that position with a "but however that may be" and asserts that Mr. Barr's action was not forbidden by law or rule. The statement in the concurring opinion that "the press release was (not) plainly beyond the scope of Mr. Barr's official business" creates a doubt as to whether it was "plainly" within the "scope."

Mr. Barr said that at the time he issued the press release he didn't have the authority to fire or even suspend the respondents. He said that he had to wait until the following Monday to take the action because of this lack of authority. (R. 5, 15) There is nothing in the record to support the majority statement that petitioner was a "policy-

making executive official" or "an official of policy-making rank" when he issued the press release.

The dissenting opinion of Mr. Justice Stewart, on the same record, insists that the issuance of the press release was "beyond 'the outer perimeter of petitioner's line of duty' ".

Reasonable men do differ on the question of whether the press release was issued in the course of petitioner's official duties. The question is, therefore, one of fact to be left to a jury.

Having decided, as a matter of law, that an officer of this Government is immune to suit for libel regardless of his motives only if his defamatory statement is "action in the line of duty", the Court should have remanded the case for a new trial for a jury to determine whether:

1. Petitioner was acting "in the line of duty" when he issued the press release and, if not,

2. Whether he had reasonable grounds to believe that his statements were true, and

3. Whether he was actuated by malice.

It is respectfully urged that the Petition for Rehearing be granted and upon rehearing that the case be remanded for a new trial. The petition is presented in good faith and not for delay.

BYRON N. SCOTT,
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Attorneys for Respondents.

APPENDIX

Memorandum to the Heads of All Departments and Agencies

The Supreme Court, on June 29, 1959, held that executive officers of the federal government have an "absolute privilege" for defamatory statements issued in the course of their official duties. (*Barr* v. *Matteo* and *Howard* v. *Lyons*). Thus, it confirmed a contention advanced by the Department of Justice that officials in the Executive Branch of government may not be held liable for damages for defamation as a result of statements made in the exercise of the duties of their offices.

The purpose of this memorandum is (1) to point out the extent and limitations of the privilege, and (2) to set forth the principles which should guide officials in the Executive Branch in the exercise of the privilege.

These decisions constitute a Supreme Court affirmation of a privilege that has long existed for many government officials. Any statement made in either House is privileged for the Constitution provides expressly that members of Congress "shall not be questioned in any other place." By Supreme Court decisions, this privilege was held applicable to the Judicial Branch of government in 1871 and cabinet officers in 1896. Since that time, the lower federal courts (with minor exceptions) have held that this privilege is not confined to cabinet officers, but extends to other executive officials performing important policy functions. In its decisions in *Barr* and *Howard*, the Court confirmed these precedents, ruling that it is not the title but the duties of the office which clothes the official with immunity from civil defamation suits.

The reason for recognizing this privilege was well stated by Mr. Justice Harlan: "It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect to acts done in the course of those duties—suits which

would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government."

1.

As to the extent and limitations of the privilege, although referred to as an "absolute privilege", it applies *only* to statements made in the course of the exercise of the duties of the office. The privilege does not apply to defamatory statements unrelated to official duties. Furthermore, there may be a close question as to whether a statement is in the line of duty of the office within the meaning of the decisions. (See dissent by Justice Stewart in the *Barr* case.) Thus, no government official should assume that these decisions give him full and complete protection against actions for defamation. Accordingly, should it become necessary for an official to issue a statement of a derogatory nature, care should be taken that the statement clearly pertains to the duties of the office and the official involved should himself be satisfied that he has the authority to issue it.

2.

Notwithstanding the existence of this privilege, officials of the Executive Branch of the federal government should act with an awareness of the vital importance of avoiding unnecessary injury to any person. An official who in the course of his official duties contemplates making a statement which might be deemed to be derogatory should be keenly aware of the heavy responsibility which falls on him. For as Justice Harlan said, "The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government." The privilege imposes therefore on all public officials a duty to act with care and restraint for

what may be at stake is the reputation of a person without legal recourse.

Furthermore, as the opinion points out "there are of course other sanctions than civil tort action available to deter the executive official who may be prone to exercise his functions in an unworthy and irresponsible manner." Although it is fully expected that the privilege will be exercised with care and thoughtful restraint (the Court points out that past experience indicates it will be) the reference to other sanctions undoubtedly includes disciplinary action or removal from office if official irresponsibility should be involved.